CLERK'S C

CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 210

AMERICAN BOND AND MORTGAGE COMPANY AND TRIANON, INC.,

vs.

UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FILED JUNE 21, 1930.

(35,132)

(35,132)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 210

AMERICAN BOND AND MORTGAGE COMPANY AND TRIANON, INC.,

vs.

UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX.

	Original	Print
Certificate from United States circuit court of appeals, seventh circuit	1	1
Statement of facts	1	1
Questions certified	6	7
Clerk's certificate (omitted in printing)	9	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 25, 1930

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Thursday, May 22, 1930.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Samuel Alschuler, Circuit Judge, presiding; Hon. Evan A. Evans, Circuit Judge; Hon. George T. Page, Circuit Judge; Hon. William M. Sparks, Circuit Judge; Henry C. W. Laubenheimer, Marshal; Edward M. Holloway, Clerk.

Before Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge; Hon. George T. Page, Circuit Judge

4291

AMERICAN BOND AND MORTGAGE COMPANY AND TRIANON, INC.,

vs.

UNITED STATES OF AMERICA

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

STATEMENT OF FACTS

On this appeal certain questions of law have arisen concerning which this Court is in doubt, and desires the instruction of the Supreme Court of the United States. We find, and counsel for the parties agree, that the relevant facts out of which the legal questions grow are:

Appeal was taken to this Court from a decree entered November 5, 1929, by the District Court for the Northern District of Illinois, Eastern Division, perpetually enjoining appellants from the threatened operation of the broadcasting station theretofore, prior to September 1, 1928 operated by them under the call letters WMBB-WOK, until said appellants should obtain a new license issued under and in accordance with the Radio Act of 1927, as amended, authorizing the operation of said station. Subsequent to Septem-

ber 1, 1928 and prior to the institution of this suit, appellants had openly announced their intention to resume operation of their station on the frequency (1190) kcs.) and with the power (5000 watts) which had been formerly used by the station. It is admitted by appellants that operation by this station on this frequency and with this power would have been resumed on Monday, October 22nd, but for the filing of this suit. An injunction pendente lite restraining the operation of the station was made final by the decree from which this appeal is taken. The enjoined station is located at Homewood, Illinois, about 25 miles south of Chi-
[fol. 2] cago. The transmitter has a maximum power of 20,000 watts and is of the type used in the operation of a broadcasting station.

On April 3, 1925, the appellant, Trianon, Inc., was licensed by the Secretary of Commerce to operate a radio station of 500 watts power, under the call letters WMBB. On May 5, 1925 this license was succeeded by one issued to American Bond & Mortgage Company to operate said transmitter for a period of three months, using the call letters WMBB, same power. Thereafter licenses were issued up to and including February 23, 1927. Thereafter, during the period from February 23, 1927 to September 28, 1927 licenses were granted by the Federal Radio Commission. From May 25, 1925 to June, 1927 appellant was authorized to use the frequency of 1200 kcs. and thereafter from June, 1927 to September 28, 1927 the frequency of 1190 kcs. with 500 watts power. Appellant shares time on this frequency with station WOK.

On July 27, 1925 the Secretary of Commerce issued a license to a corporation known as Neutrowound Radio Manufacturing Company to operate a 500 watts transmitter at Homewood, Illinois, under the call letters WOK. On November 13, 1925 this license was succeeded by another license issued to operate a new transmitter on the same premises with a power of 5000 watts, using the call letters WOK, which license was renewed until February 23, 1927, and thereafter by the Federal Radio Commission until April 27, 1927.

On the last mentioned date Trianon, Inc. acquired said station from Neutrowound Radio Manufacturing Company for a valuable consideration, together with all legally

assignable rights to the use of call letters WOK. The license to the Neutrowound Manufacturing Company was on its expiration date replaced by a license to the appellant Trianon, Inc. Thereafter the Commission, from time to time issued successive licenses to appellant, Trianon, Inc., to opérate said 5000 watts transmitter until September 28, 1927, with a daily division of time with station WMBB. During the period from April 22, 1927 to September 28, 1927 the two stations WMBB and WOK, while they nominally divided time, were to a large extent operated as one station with a continuous broadcasting service, the appellants American Bond & Mortgage Company and Trianon, Inc. being in close financial relation to each other.

[fol. 3] On or about August 3, 1927 the Federal Radio Commission issued a construction permit to the appellant, American Bond & Mortgage Company for the construction of a new transmitter with a maximum power of 20,000 watts, pursuant to a finding by the Commission that public interest, convenience or necessity would be served by the construction of such station. Upon the completion of the construction of the new station the Commission, on or about September 28, 1927 issued a license to appellant, American Bond & Mortgage Company authorizing it to operate said transmitter on full time until October 14, 1927, on a frequency of 1190 kcs. with 5000 watts power, which license was by a later order of the Commission extended to November 1, 1927. On November 1, 1927 pursuant to written application, the Commission granted appellant, American Bond and Mortgage Company a license authorizing it to operate said transmitter for a further period of 60 days on the same frequency and power, and this last mentioned license was extended from time to time, until it finally expired on September 1, 1928, a renewal beyond said last mentioned date having been refused by the Federal Radio Commission as hereinafter set forth.

Pursuant to the Joint Resolution of Congress approved December 8, 1926, appellant, American Bond and Mortgage Company, filed with the Secretary of Commerce on January 24, 1927, in connection with and as part of an application which it was then making for renewal of its license to operate Station WMBB, a signed written waiver of

"any right or any claim of right as against the United States, to any wave length, or to the use of the ether in radio transmission, because of previous license to use the same or because of the use thereof."

The record does not show whether the Neutrowound Radio Manufacturing Company filed a similar written waiver with respect to Station WOK.

In all applications for license or renewal of license filed by either appellants after February 23, 1927 (including the application for renewal of January 13, 1928, hereinafter mentioned, which was denied by the Federal Radio Commission), was contained a written waiver by the applicant

"of any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise."

Each of the licenses and renewal licenses issued by the [fol. 4] Commission to either appellant (including the license which with extensions covered the period from November 1, 1927 to September 1, 1928, and renewal of which was denied by the Commission) contained the following condition:

"This station license shall not vest in the license any right to operate the station nor any right in the use of the frequencies or wave length designated in the license beyond the term thereof nor in any other manner than authorized therein."

On January 13, 1928, appellant duly filed an application for a renewal of the license then held by it (for 5000 watts on 1190 kcs. full time). This license originally covered a period of sixty days, beginning November 1, 1927, but was extended from time to time for short periods of from thirty to sixty days so that it finally expired on September 1, 1928.

On May 23, 1928, the Commission entered its General Order No. 32, which recited that the Commission, after examination of the license applications of the applicants named therein, including appellant, American Bond and

Mortgage Company, was not satisfied "that public interest, convenience or necessity would be served by granting these applications," and fixed the date of July 9, 1928 at ten o'clock, A. M., in its offices at Washington, D. C. as the time and place for hearing on each of the applications, which were 164 in number. The Commission mailed a copy of its order to appellant, American Bond and Mortgage Company accompanied by a letter stating, among other things:

"At this hearing unless you can make an affirmative showing that public interest, convenience or necessity will be served by the granting of your application, it will be finally denied."

On July 9, 1928, appellants appeared before the Commission by counsel, as did a large proportion of other stations included in the Order, the hearing on appellants' application being held partly on July 19, 1928 and partly on July 23, 1928. On August 31, 1928 the Commission took action with reference to said appellants' application by rendering the following order:

"The Commission having considered the evidence and the arguments presented to it in the above entitled case, heretofore heard and taken under advisement, and having found that public interest, convenience or necessity would not be served by granting said application,

"It is ordered, that said application be, and the same [fol. 5] is hereby denied; this order to be effective on September 1, 1928, at the hour of 3 o'clock A. M., Eastern Standard Time.

Federal Radio Commission, by Ira E. Robinson, chairman."

Dated August 31, 1928.

Prior to September 1, 1928, appellants had expended on the Homewood transmitter, sums aggregating $100,000.00. The market for the transmitter and incidental equipment is so limited that appellants will be unable to realize from the sale thereof more than a small part of the money invested therein, in fact not more than what would commonly be regarded as its junk value. Appel-

lants have placed certain expensive improvements upon the real estate to house the transmitter; these improvements are designated and particularly adapted for use in connection with the radio broadcasting station and consequently said real estate cannot be sold without a very substantial loss with respect to such improvements. In addition, appellants claim that their radio broadcasting business included a going value and a good will of its radio audience attaching to the call letters WMBB-WOK, to the frequency of 1190 kcs. used in broadcasting their programs, and to the programs themselves. It appears that the programs broadcast by appellants consisted mainly of entertainment (chiefly music) and of talks and addresses on various subjects. During the first eight months of 1928 appellants expended a sum in excess of $23,000.00 for services of employees exclusively for the operation of their station. While there have been occasional instances when appellants have sold time on their programs to advertisers, the revenue from the sale of such time has been of so small an amount as to be practically negligible. Appellants state that:

"Their purpose has at all times been to maintain these stations as a service to the public, and that the only return which they have received or expected to receive, has been from the good will of their patrons and listeners resulting from the high quality of programs which they have broadcast."

Appellant, American Bond and Mortgage Company, is engaged in operating an investment service to a large number of investors in all parts of the United States, both within and without the borders of the State of Illinois, and in selling to such investors bonds, mortgages and other [fol. 6] securities. Appellant, Trianon, Inc., is engaged in the operation for profit of two large public ballrooms in the City of Chicago.

By General Order 40 of the Federal Radio Commission adopted on August 30, 1928, the frequency of 1190 kcs. was designated as a cleared channel (to be used by only one station at a time in evening operation and that to be of substantial power of 5000 watts or more) and was assigned to the Third Zone, as established by Section 2 of the Radio

Act of 1927, and pursuant to the equalization requirements of Section 5 of the Amendatory Act of March 28, 1928. Since November 11, 1928, certain Texas broadcasting stations (WRR and WOAI), which had theretofore operated on other frequencies, have, on a division of time between them, operated exclusively on the frequency of 1190 kcs. with power of 5000 watts each. The operation of appellants' station on this frequency would cause such interference with reception of programs from the Texas stations, and their operation would cause such interference with reception of programs from appellants' station, that the area served with satisfactory reception from either station would be reduced to a small area in the vicinity of each station if they were permitted to operate simultaneously on the same frequency. Appellants state, however,

"that in the event it shall become in the future impossible to broadcast on a frequency of 1190 kcs. in such manner as to satisfactorily transmit their programs to their listeners and patrons, they claim the right to broadcast on such other frequency as will enable them to reach said patrons and listeners, so long as such wave length shall not interfere with interstate commerce or the lawful regulation of the Government for the protection thereof."

There is, however, no frequency in the entire band of 90 frequencies or channels available for use by broadcasting stations in the United States on which appellants' station can be permitted to operate without seriously interfering with reception of programs from some one or more broadcasting stations now in operation under licenses from the Federal Radio Commission and without very substantially reducing the areas served by such stations with satisfactory reception.

Questions Certified

Question 1. Did a corporation which, prior to the enactment of the Radio Act of 1927, applied for and obtained successive licenses from the Secretary of Commerce authorizing such corporation to broadcast with a specified [fol. 7] transmitter, and which acquired and owned the necessary apparatus, the building in which the apparatus was housed, and the land whereon the same was located,

and continuously broadcasted therewith to an audience interested in its radio programs, have or acquire thereby a property right within the meaning of the word "property" as used in the Fifth Amendment to the Constitution of the United States,

(a) In the continuance of broadcasting by such corporation as a business or occupation?

(b) In the continued use of such apparatus, building and land for similar broadcasting purposes?

Question 2. Does a corporation, which, subsequent to the enactment of the Radio Act of 1927, expended substantial sums in replacing old apparatus with new after obtaining a construction permit from the Federal Radio Commission, and thereafter used the new apparatus under licenses issued by the Federal Radio Commission and continuously broadcast therewith to an audience interested in its radio programs, have or acquire thereby a property right within the meaning of the word "property" as used in the Fifth Amendment to the Constitution of the United States,

(a) In the continuance of such broadcasting as a business or occupation?

(b) In the continued use of such apparatus, building and land for similar broadcasting purposes?

Question 3. If by virtue of the answers to questions 1 and/or 2, it appears that such a corporation had or acquired such property rights, is such a corporation deprived of property without due process of law or without just compensation contrary to the provisions of the Fifth Amendment to the Constitution of the United States by virtue of the waiver required by the joint resolution of Congress of December 8, 1926 or the waiver referred to in the last paragraph of Section 5, or the condition required to be contained in all licenses by sub-paragraph (a) of Section 11, of the Radio Act of 1927, as amended

Question 4. If by virtue of the answers to questions 1 and/or 2, it appears that after February 23, 1927 such a corporation had or acquired such a property right, is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commis-

sion, in acting upon an application for renewal of license by said person, to deprive such person of such property without due process of law, in that the only standards pro- [fol. 8] vided by the Act for the guidance of the Commission in acting upon such applications are that of "public interest, convenience or necessity" and that set forth in Section 5 of the Amendatory Act of March 28, 1928, and in that the Act fails to require that the Commission, prior to proceeding to a hearing or decision on such application, shall specify in what respect it deems or has failed to find that the granting of such application would not serve public interest, convenience or necessity, contrary to the provisions of the Fifth Amendment to the Constitution of the United States?

Question 5. If by virtue of the answers to questions 1 and/or 2, it appears that after February 23, 1927 such a corporation had or acquired such a property right, is the Act of March 28, 1928 amending the Radio Act of 1927 (commonly known as the Davis Amendment) valid as against the claim that it authorizes or requires the Federal Radio Commission, in acting upon an application for renewal of license to deprive such person of such property without due process of law or to take private property for public use without just compensation, contrary to the provisions of the Fifth Amendment to the Constitution of the United States?

Question 6. If by virtue of the answers to questions 1 and/or 2, it appears that after February 23, 1927 such a corporation had or acquired such a property right, is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission in its action on an application for renewal of license by a person such as is described in question 2 to take property for public use without just compensation, by denying such application, contrary to the provisions of the Fifth Amendment to the Constitution of the United States?

The Clerk of this Court is hereby directed to transmit a certified copy hereof to the Supreme Court of the United States.

[fol. 9] Clerk's certificate to foregoing certificate omitted in printing.

Endorsed on cover: File No. 35,132. U. S. Circuit Court of Appeals, Seventh Circuit. Term No. 210. American Bond and Mortgage Company and Trianon, Inc., vs. United States of America. (Certificate.) Filed June 21, 1930. File No. 35,132.

(4693.)

MO



TION

FILED
AUG 26 193
CHARLES ELMORE CR
CLE

FILE COPY

No. 210

In the Supreme Court of the United States

OCTOBER TERM, 1930

AMERICAN BOND AND MORTGAGE COMPANY AND TRIANON, INC.

v.

UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION BY THE UNITED STATES TO ADVANCE

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 210

AMERICAN BOND AND MORTGAGE COMPANY AND Trianon, Inc.

v.

UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION BY THE UNITED STATES TO ADVANCE

The Solicitor General, pursuant to Rule 20, paragraph 6, of this Court, moves to advance the above-entitled case for hearing immediately following the case of *White* v. *Johnson,* No. 29, October Term, 1930.

Prior to the enactment of the Radio Act of 1927, c. 169, 44 Stat. 1162, American Bond and Mortgage Company and Trianon, Inc., hereinafter called appellants, acquired and continuously operated under successive licenses from the Secretary of Commerce a radio broadcasting station. After the enactment of the Radio Act of 1927 appellants expended substantial sums in replacing old apparatus

with new under the authority of a construction permit from the Federal Radio Commission and thereafter continuously broadcast with the new apparatus under successive licenses issued by the Federal Radio Commission. The Commission on August 31, 1928, after a hearing, issued an order effective September 1, 1928, denying appellants' application for a renewal of a license to broadcast. Appellants later openly announced their intention to resume operation of their broadcasting station and the United States thereupon filed this suit in equity to enjoin them from operating their station until they should obtain a new license issued under and in accordance with the Radio Act of 1927. The District Court entered a final decree perpetually enjoining such operation. On appeal to the Circuit Court of Appeals for the Seventh Circuit that court certified certain questions to this Court, asking whether appellants acquired a property right within the meaning of the word "property" as used in the Fifth Amendment to the Constitution of the United States; and if so, whether the action of the Federal Radio Commission taken in conformity with the Radio Act of 1927 and with the amendatory Act of March 28, 1928, c. 263, 45 Stat. 373, commonly known as the Davis Amendment, constituted a taking of property without due process of law or a taking of private property for public use without just compensation, contrary to the provisions of said Fifth Amendment.

In *White* v. *Johnson, supra,* the Federal Radio Commission did not refuse a broadcasting license but materially reduced the operating power of a broadcasting station, and the Circuit Court of Appeals for the Seventh Circuit has certified to this Court substantially the same questions of law as those which it has certified in this case.

An early decision by this Court upon the questions certified is of general public interest because such decision will determine the constitutionality of important provisions of the Radio Act of 1927 and of the Davis Amendment authorizing the Federal Radio Commission adequately to regulate radio broadcasting and communication.

Opposing counsel concur in this motion to advance.

THOMAS D. THACHER,
Solicitor General.

AUGUST, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

[Reg. No. 35,132]

FILE COPY

FILED

NOV 8 1930

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 210

AMERICAN BOND AND MORTGAGE COMPANY AND TRIANON, INC.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR APPELLANTS.

FRANK H. SCOTT,
GEORGE W. SWAIN,
EDWARD B. HAYES,
Solicitors for Appellants.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

SUBJECT INDEX.

	Page
Citation of Opinion of United States District Court, Northern District of Illinois	1
Jurisdiction	2
Certificate from United States Circuit Court of Appeals for Seventh Circuit (Appendix)	i
Radio Act of 1927, as Amended (Appendix)	xi
Statement: Facts and Issues	3
Argument	19
Summary of Argument:	
Point A. Appellants had a Property	19
I. Priority of Use Gives a Property Right	19
II. Appellants' Right to Continue Their Legitimate Established Business Was a Property Right Which Could Not Be Confiscated (Even for Public Use) Without Just Compensation	25
1. The right to continue a legitimate and established business is property under the decisions of this Court	25
2. It is the settled doctrine of the Supreme Court of Illinois, where appellants went into the business, that the right to continue a legitimate and established business is property	27
3. It is the generally accepted rule, that the right to continue a legitimate and established business is property	28
4. The power of the Federal Government to regulate commerce is subject to all the limitations of the Fifth Amendment	29
5. The going value of a business is property in the constitutional sense	29
Point B. Appellants' Property Was Taken	30

I. To Forbid the Owners of This Established Business, Having Priority In The Field, To Carry It On At All, Anywhere, At Any Time, Or Under Any Regulations, Is A "Taking" And A "Depreviation", Both of The Business And Its Physical Property For Which There Must Be Compensation..... 30

II. The Contention Relied On To Warrant Taking Appellants' Property Without Compensation Is A Specious Argument As To "The Nature Of Things"..... 41

III. This Legislation Deprives Appellants of Their Property Rights Arbitrarily And Unreasonably, And Without Due Process Of Law.... 55

1. A licensing scheme designed and applied to take private property without compensation, is not due process of law.... 55

2. To put appellants entirely out of the business and sacrifice their investment upon their failure to guess correctly every three months what an administrative agency of changing membership means by "public interest, convenience, or necessity", is harshly penal, grossly unfair, and not due process of law.... 59

3. This radio legislation leaves room for the play and action of arbitrary personal power 66

4. The requirement of equality bears no reasonable relation to any legitimate purpose which Congress is empowered to accomplish 77

Point C. Is Broadcasting Commerce..... 81

Point D. The waivers required by the joint resolution of Congress of December 8, 1926, and by the Radio Act of 1927 are invalid..... 81

Conclusion 85

Table of Cases Cited.

Adams v. Tanner, 244 U. S. 590 ..... 36, 75
Atchison v. Peterson, 20 Wall. 507 21

Bailey v. People, 190 Ill. 28 27
Bauer v. City of Chicago, 321 Ill. 259 75
Blanchard v. The Martha Washington, 1 Cliff. 463, 3 Fed. Cas. No. 1513 55
Board of Administration v. Miles, 278 Ill. 174 74
Bradshaw v. Ashley, 180 U. S. 59 12
Brown, et al. v. Piper, 91 U. S. 37 3
Buchanan v. Warley, 245 U. S. 60 34
Butchers Union v. Crescent City, 111 U. S. 757 71

Carmichael v. Anderson, 14 Fed. (2nd) 166 9
Chicago and North Western Ry. v. Nye, Schneider Fowler Co. 260 U. S. 35 65
Chicago, Milwaukee & St. Paul Ry. v. Polt, 232 U. S. 165 65
City of Richmond v. Dudley, 28 N. E. (Ind.) 312 72
City of New Orleans v. New Orleans Butchers Co-op. Abattoir, Inc., 96 So. (La.) 113 75
Covington Turnpike Co. v. Sandford, 164 U. S. 578 32

Davies v. City of Hot Springs, 217 S. W. (Ark.) 769 55
Dockery v. State, 247 S. W. (Tex.) 508 75
Duplex Co. v. Deering, 254 U. S. 443 ..... 2, 25

Eldridge v. Trezevant, 160 U. S. 452 52
Electric Public Utilities Co. v. West, 140 Atl. (Md.) 840 .. 75

Fairbank v. U. S. 181 U. S. 283 28
Faison, ex parte, 248 S. W. (Tex.) 343 75
Federal Radio Com. v. General Electric Co. 281 U. S. 464 .. 64
Field v. Clark, 243 U. S. 649 66
Frost v. R. R. Commission, 271 U. S. 583 83

Gallardo v. Questell, 29 Fed. (2d) 897 28
Gibbons v. Ogden, 9 Wheat. 1 ..... 11, 76, 77
Greenleaf Lumber Co. v. Garrison, 237 U. S. 251 52

Hammer v. Dagenhart, 247 U. S. 251.....75, 77
Hanover Star Milling Co. v. Metcalf, 240 U. S. 403..... 22
Harrison v. St. L. & San Francisco R. R. 232 U. S. 318.... 85
Hewitt v. Board of Medical Examiners, 148 Cal. 590..... 65
Hill Military Academy v. Pierce, Governor of Oregon, 296 Fed. 928 (aff'd 268 U. S. 510)..... 26
Hoboken v. Pennsylvania Railroad Company, 124 U. S. 656 49
Holden v. Hardy, 169 U. S. 366..... 28
Home Insurance Co. of N. Y. v. Morris, 87 U. S. 445..... 83
Hoover v. Inter City Radio Company, 286 Fed. 1003..... 9

Jennison v. Kirk, 98 U. S. 453..... 20

Klein v. Barry, 196 N. W. (Wis.) 457..... 75

Lake Shore & Michigan Southern Railway Co. v. Smith, 173 U. S. 684, 687, 690..... 32
Lau Ow Bew v. United States, 144 U. S. 47..... 2
Los Angeles Gas and Electric Co. v. City of Los Angeles, 241 Fed. 912 (aff'd 251 U. S. 32).....22, 43

Martin v. District of Columbia, 205 U. S. 135..... 33
McCardle v. Indianapolis Water Company, 272 U. S. 400..30, 32
Minnesota Rate Cases, 230 U. S. 352.....28, 32
Missouri v. Holland, 252 U. S. 416..... 44
Mohawk, The, 3 Wall. 566..... 55
Monongahela Navigation Co. v. U. S. 148 U. S. 312.....28, 47
Monticello v. Bates, 87 S. W. (Ky.) 555..... 75
Muhlker v. N. Y. & Harlem R. R. Co. 197 U. S. 544.....12, 27

Noel v. People, 58 N. E. (Ill.) 616..... 75
Norwood v. Baker, 172 U. S. 269..... 28

Pennsylvania Co. v. Mahon, 260 U. S. 393.....39, 57, 85
People v. Klinck Packing Co. 108 N. E. (N. Y.) 278..... 75
People v. Love, 298 Ill. 304..... 27
People ex rel. N. Y. Central & Hudson River R. Co. v. Public Service Commission, 195 N. Y. 157..... 69
Peppers, In re, 209 Pac. (Cal.) 896..... 75
Pullman Co. v. Kansas, 216 U. S. 56..... 82
Pumpelly v. Green Bay Co. 80 U. S. 166.....34, 51
Purvis v. Local No. 500, 214 Pa. 348, 63 Atl. 585..... 28

Railroad Commission Cases, 116 U. S. 307, 331..... 31

Schlesinger v. Wisconsin, 270 U. S. 230..... 58
Sheldon v. Hoyne, 261 Ill. 222..... 75
Slaughterhouse Cases, 83 U. S. 36..... 35
Smyth v. Ames, 169 U. S. 466, 523..... 32
Southern Pacific Co. v. Denton, 146 U. S. 202..... 83
St. Clair v. United States, 154 U. S. 134..... 55
State v. Cadigan, 73 Vt. 245, 50 Atl. 1079..... 28
State v. Chapman, 69 N. J. Law 464, 55 Atl. 94..... 28
State ex rel. Markis v. Superior Court, 193 Pac. (Wash.) 845 73
State v. Fowler, 114 So. (Fla.) 435..... 74
Stearns Lumber Co. v. Howlett, 157 N. E. (Mass.) 82, 86 28
Superior Motor Bus Co. v. Community Motor Bus Co. 320 Ill. 175 .....63, 69, 80

Terral v. Burke Construction Co. 257 U. S. 529..... 83
Tribune Company v. Oak Leaves Broadcasting Station, Circuit Court of Cook County, Ill. (unreported)..... 19
Truax v. Corrigan, 257 U. S. 312..... 25
Tyson & Bro. v. Banton, 273 U. S. 418.....37, 38, 57

Union Bridge Co. v. United States, 204 U. S. 364..... 52
United States v. Cress, 243 U. S. 316.....34, 51, 52
United States v. Cutting, 70 U. S. 441..... 55
United States v. Lynah, 188 U. S. 445.....29, 51
United States v. Zenith Radio Corporation, 12 Fed. (2d) 614 .....9, 10, 69

Welch v. Maryland Casualty Co. 147 Pac. (Okla.) 1046.... 70
Wood v. Security Mutual Life Insurance Co. 112 Neb. 66 28
Winslow v. Fleischner, 228 Pac. (Ore.) 101..... 75
Western Union Tel. Co. v. Kansas, 216 U. S. 1..... 83
Western Union Tel. Co. v. Frear, 216 Fed. 199 (aff'd 241 U. S. 329)..... 84

Yick Wo v. Hopkins, 118 U. S. 356.....70, 71, 72

Table of Statutes.

Acts of Congress

March 3, 1891, c. 517, Sec. 6 2
June 24, 1910, 36 Stat. 629 7
March 3, 1911, c. 231, Sec. 239 2
July 23, 1912, 37 Stat. 199 7
August 13, 1912, 37 Stat. 302 (Radio Law of 1912) 7, 8, 10, 61
February 23, 1925, c. 229, Sec. 1 (43 Stat. 938) 2, 12, 13
Joint Res., Dec. 8, 1926, 44 Stat. 917 .....45, 81
February 23, 1927, c. 169, 44 Stat. 1162 *et seq.* (Radio Act of 1927) 2, 12, 13, 15, 45, 64, 81
March 28, 1928, c. 263 (45 Stat. 373) 2
March 28, 1928, c. 263, Sec. 5 (Davis Amendment) 7, 12, 15, 64, 78
Feb. 28, 1920, c. 91 (41 Stat. 474 *et seq.*) 60
Joint Res., July 16, 1918, 40 Stat. 904 61
Illinois Rev. Stats. (Cahill, 1930) c. 111a, §§ 2, 71 59
New York Cons. Laws, c. 49, § 9 60
New York Cons. Laws, c. 48, §§ 53, 68, 81, 99 60
March 4, 1929, c. 701, Sec. 3, 45 Stat. 1559 15

TEXTBOOKS, ENCYCLOPEDIAS AND OTHER REFERENCES.

American Bar Assn., Interim Report of the Committee on Radio Legislation, Dec. 8, 1926 53

Congressional Record
Vol. 68 pp. 2871-2 45
p. 2873 4
p. 2565 14
pp. 216-9 19
Vol. 69 pp. 5160-1 16

Senate Report 698, 62nd Congress, 2nd Sess. 5 7

Senate Report 698, 62nd Congress, 2nd Sess. 7 8

Davis, The Law of Radio Communication, 32 ..... 7, 11, 45

Digest, Bk. 41, Tit. 1, De Adquir, Rer. Dom 43

Durant, Story of Philosophy, 184 45

Eddington, The Nature of the Physical World, 248-9 ... 6, 11 44

Holmes, The Path of the Law (1897) 10 Harv. L. Rev. 457, 476-7 43

Kent's Com. Vol. 3 (Gould, 14th ed.) 427 48

29 Op. Atty. Gen. 579, 581 9

35 Op. Atty. Gen. 126 ..... 9, 10, 11

15 R. C. L. 1057 3

Vattel, Law of Nations, Vol. III, p. 84 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 210

AMERICAN BOND AND MORTGAGE COMPANY AND TRIANON, INC.,

Appellants.

vs.

UNITED STATES OF AMERICA,

Appellee.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR APPELLANTS.

FIRST.

OPINION OF DISTRICT COURT.

The opinion of the District Court for the Northern District of Illinois, Eastern Division, is reported at 31 F. (2d) 448.

SECOND.

JURISDICTION.

The case comes to this Court on questions certified from the Circuit Court of Appeals for the Seventh Judicial Circuit. As stated in the Certificate, the Federal Radio Commission set up by the Act of 1927, as amended, (Feb. 23, 1927, c. 169, 44 Stat. 1162, *et seq.*; March 28, 1928, c. 263, 45 Stat. 373; 47 USCA c. 4) on August 31, 1928 denied appellants a license to continue operation of their broadcasting station on the ground that their continued operation would not serve public interest, convenience or necessity, and then licensed two stations located in Texas to use the frequency and power appellants had been using. (Certificate 5, 6, 7.) Appellants thereupon threatened to continue operation and on November 5, 1929, at the suit of the United States, they were perpetually enjoined from operation by order of the District Court for the Eastern Division of the Northern District of Illinois. (Certificate 1.) Appellants appealed from this order to the Circuit Court of Appeals for the Seventh Circuit, which has certified the questions stated in the Certificate on file in this Court. (Certificate 7 *et seq.*) The statute giving this Court jurisdiction of questions so certified is Act of Congress February 13, 1925, c. 229, sec. 1, 43 Stat. 938, 28 USCA, sec. 346 (amending Acts of Congress March 3, 1911, c. 231, sec. 239; March 3, 1891, c. 517, sec. 6). Appellants claim infringement of their rights under the Constitution of the United States. (*Lau Ow Bew* v. *United States*, 144 U. S. 47, 58.)

THIRD.

Statement—Facts and Issues.

Reference is made to facts stated in the Certificate of the Circuit Court of Appeals on file in this Court.[1] We ask the Court also to consider and to take judicial notice of previous radio legislation, pertinent statements in the reports of Congressional Committees and by members of such committees in charge of the bills on the floor of Congress explanatory of their intent (*Duplex Co.* v. *Deering,* 254 U. S. 443, 474) and of certain other matters, touching the history and physical nature of radio, which are matters of science, or matters which "are, or ought to be, generally known." (15 R. C. L. 1057; *Brown, et al.* v. *Piper,* 91 U. S. 37, 42.) These, with the facts certified, are included in the following statement of the case, together with a statement of the issues defined by these facts under established principles.

Terms: No one really knows how or why manifestations of energy in the listener's radio set correspond with those of the broadcasting machine. While it is common to speak of "ether" and of "waves," (those conceptions being used by Hertz and others in their early development of the mathematical theory of radio—they borrowed it from what was then the theory of light) it is well known that in view of work done by Einstein and others, science has called in question the hypothesis advanced by its earlier pioneers, of waves in an etherial

[1] See copy in Appendix.

medium; many scientists now prefer other theories as better explanations of these phenomena.[1]

But if "ether" is not among the facts, still, it is a fact that while one broadcasting apparatus is being used, the use of another such apparatus sufficiently near by and in the same way, (with similar "frequency") defeats the use of both. This is called "interference"; which is obviously metaphorical, but a useful figure of speech nevertheless. By similar metaphor, a range of frequencies sufficiently alike to result in "interference" when used simultaneously by more than one machine, may be called a "channel." When free from "interference" that may be expressed by the phrase, "a cleared channel."

It is awkward to refer to these phenomena by literal description in each instance, and therefore we use these figurative words in the meaning just explained; we do not thereby imply any unscientific and unproved assumptions as to the ultimate nature of the phenomena themselves.

HISTORICAL: We have had radio broadcasting for the past decade.[2] Radio transmission of point to point messages is older still. New or old, radio, is, of course, governed by the Constitution.

---

[1] This was recognized by the authors of the bill. Senator Dill, member of the Committee in charge of the 1927 bill, said on the floor of the Senate: "Now, let us come down to the physical situation of the regulation of radio. What we do is to license a certain piece of apparatus. We do not have anything to do with the air or the ether, whatever it is. Nobody knows what it is. We have nothing whatsoever to do with the air any more than we have to do with the buildings or the trees. * * *" (Cong. Rec. Vol. 68, p. 2873.)

[2] Station KDKA, Pittsburgh, erected in 1921, seems to have been the original of the now familiar broadcasting station.

Radio broadcasting was comparatively new in 1927 and 1928 when the present act was passed and amended. In those years it retained, even more than now, much of the same wonder that was aroused by the incandescent lamp, the phonograph and the airplane, each in their own day.

After almost ten years, broadcasting remains, what it has always been, the business of advertising through a novel form of entertainment—as everybody knows. It shows no indication of change in this respect; the 1927 Act has not changed it. On the contrary, broadcasting is more and more highly organized on precisely these lines. So far as can be judged, they are necessarily permanent. The inducement of the broadcaster is advertising and what he is paid for advertising. This means he must reach the widest possible audience and the way to do that is to entertain. It is safe to say that any attempt by Congress to impair the dominant entertainment feature would be blocked by effective popular resentment, and certainly Congress has not made any such attempt.

If radio was comparatively new in 1927 and 1928, the conflict between private right and public power was not. The Constitution establishes the traditional Anglo-Saxon rule of right for the resolution of that conflict—the public can take the use of anything it wants in the vindication of its interests, even against the private owner's will; but it must pay. The learned District Court, after a good deal of emphasis upon the novelty of radio[1] and argument apparently based on some obsolescent scientific theories about it, concluded: "*The rights* of the indi-

[1] "Radio transmission is one of the great scientific achievements of all time. It has become one of the main factors in the life and civilization of the world." (Dist. Court's opinion, 31 Fed. (2d) 448, 450.)

vidual broadcaster must give way to the paramount interest of the receiving public * * *'' (our italics.)[1]

As between private right and public interest, anyone will choose public interest if that is all there is to it. But, we submit, under the rule of right established by the Fifth Amendment, which has adjusted the conflict between public interest and private right for a century and a half, neither can be utterly disregarded in such a case as this. If the public interest indeed requires that the public should confiscate appellant's business and the value of their large investment in physical property, then private persons cannot cry an absolute halt. But it would be intolerable if public power, in the interest of public entertainment, could thus confiscate and destroy the business, and the right of priority, and the investment of private persons, which they have established in exercise of a natural right, and with the encouragement of Congress, *without just compensation.*

It is admitted that commencing at least as early as 1925 the appellants had a legitimate business of broadcasting. They used therein the peculiar technical method which makes broadcasting possible, as other businesses use their own appropriate technique. They had a large investment in physical property, the value of which de-

[1] 31 Fed. (2d) 448, 456. (Italics ours.) Also note the discussion of ''ether.'' (Ibid, p. 456.) The terminology of science as to light and radio having been adopted when the theory of literal ''waves in the ether'' was the favored hypothesis, it perforce uses that terminology still; however, the use is not even quasi-literal now, but consciously figurative. Having referred to various discarded assumptions as to ether, the Plumian Professor of Astronomy of Cambridge University concludes: ''It must be our aim to avoid such prejudgments, which are surely illogical; and since we must cease to employ familiar concepts, *symbols* have become the only possible alternative.'' A. S. Eddington, *The Nature of the Physical World,* 248, 249.

pended on continuance of the business. No one "interfered" with them; they had priority in the field.

Appellants went into the business before Congress undertook to exclude anyone but aliens therefrom, and were continuously engaged therein until this suit was brought to stop them under the Radio Act of 1927, and the Davis Amendment of 1928. (Act of Congress March 28, 1928, c. 263, sec. 5.) For some time they had operated as one station, WOK-WMBB.

The first legislation with respect to radio was the Act of June 24, 1910.[1] It was not intended to exclude anyone. "It is not a regulatory act, but is directed solely to the safety of life at sea."[2] The next enactment was that of August 13, 1912, entitled "An Act to Regulate Radio Communication," hereinafter sometimes called the law of 1912.[3] The intent of the law of 1912 was stated as follows by the Committee which reported the bill to the Senate:

> "Radio communication has already demonstrated its value as an agency for promoting the security of life and property at sea, and under proper supervision and regulation that value can be greatly increased. The most important purpose of this bill is to regulate that agency so as to attain that end so far as the committee by past experience has been able to judge situations which have arisen and provide for situations which may arise calling for its use." (Senate Report 698, 62nd Congress, Second Session, page 5.)

The language of this 1912 Act was broad enough to in-

---

[1] 36 Stat. 629; amended July 23, 1912, 37 Stat. 199, and still in force.

[2] Davis, *The Law of Radio Communication*, p. 32. Judge Stephen Davis was formerly Solicitor for the Department of Commerce. The results of his study of this branch of the law are expressed in this treatise.

[3] 37 Stat. 302.

clude not only "wireless telegraphy" but "wireless telephony" as well. It was directed at point to point transmission of messages. Broadcasting was not known when the Act was passed. The Senate Committee reporting on the bill said:

> "The term 'radio communication' instead of 'radio telegraphy' is used throughout the bill so that its provisions will cover the possibility of the commercial development of radio telephony." (Senate Report 698, 62nd Congress, 2nd Session, p. 7.) And again: "The bill is framed to be adjustable to that improvement (radio telephony) when it comes, but in the meantime it deals with the art as it exists today." (Ibid)[1]

The language of the Act which at a later date had the effect of bringing broadcasting within its intent was: "the transmission of radiograms *or signals,*" etc. (Act of Congress Aug. 13, 1912, c. 287, §§ 1, 6.) The question promptly arose whether the Secretary of Commerce had power to refuse licenses to any applicant. The Committee on Merchant Marine and Fisheries (the name of the committee to which the 1912 bill was referred evidences the congressional attitude) in its report to the House had said:

> "The first section of the bill defines its scope within the commerce clause of the Constitution, and requires all wireless stations, ship and shore, public and private, to be licensed by the Secretary of Commerce and Labor. *This section does not give the head of that department discretionary power over the issue of the licenses,* but in fact provides for an enumeration of the wireless stations of the United States and on vessels under the American flag. The

[1] This act shows the way to protection of point to point communication by setting off and reserving a "band of frequencies." In the 1912 Act this band of frequencies was reserved for a different purpose, broadcasting being neither known nor anticipated when that law was passed, but the method is there. It is well known that the broadcasting machines have not been built to use the frequencies used for point to point messages.

> license system proposed is substantially the same as that in use for the documenting upward of 25,000 merchant vessels." (Quoted: 29 Op. Atty. Gen. 579, 581.)

The Attorney General ruled:

> "* * * it is manifest that when Congress said that 'a person, company, or corporation within the jurisdiction of the United States shall not use or operate any apparatus for radio communication * * * except under and in accordance with a license, revocable for cause, in that behalf granted by the Secretary of Commerce and Labor upon application therefor,"[1] it did not intend to repose any discretion in the Secretary as to the granting of the license, if the application came within the class to whom licenses were authorized to be issued." (29 Op. Atty. Gen. 579, 581.)

This opinion was confirmed by decisions of the courts. *Hoover* v. *Inter City Radio Company,* 286 Fed. 1003; *Carmichael* v. *Anderson,* 14 Fed. (2d) 166, 167; *U. S.* v. *Zenith Radio Corporation,* 12 Fed. (2d) 614. It being settled that Congress had not undertaken to exclude anyone but aliens from this new field, the further question arose as to whether the Secretary of Commerce and Labor had authority of law to fix frequencies, limit times of operation and power, or set any other limit or conditions upon the licenses which he must issue to any applicant. This included the question of his authority to set a definite duration for such licenses. The opinion of the Attorney General upon the subject (35 Op. Atty. Gen. 126) was that the act itself (Sec. 4) constituted "a direct legislative regulation of the use of wave-lengths." (In view of the prior rulings and cases, referred to in the opinion, the Secretary had to permit some frequency to each applicant, subject only to Section 4 of the statute as to "wave-lengths," or frequencies.) The rationale of the opinion on the 1912 Act is that Section 4 as to "wave-

[1] 37 Stat. 302.

lengths" served the congressional purpose of reducing interference, but that other limitations as to power, time of operation, or duration of licenses could not be validly imposed by the Secretary through restrictions in the terms of the license, because the act did not intend that, or any other regulation than the Act made directly by its own force. The opinion had the support of the previous decision of the court in *U. S.* v. *Zenith Radio Corporation,* 12 Fed. (2d) 614.

It is obvious that the Act itself did not limit the term of the licenses which the Secretary was required to issue; and, under the above construction by the Attorney General and the courts, it is obvious that the Act gave the Secretary no power to limit the term of such license. He had attempted to do so, but such limitations were even more plainly void in the light of the foregoing authority than his attempted limitations upon station power, which bore more immediate relation to the interference with point to point communication at which the Act was directed. The opinion states the Secretary under the 1912 Act had "no general authority to fix the times at which broadcasting stations may operate," (*Ibid,* p. 131) and that there was no authority of law to limit the *duration* of licenses. (*Ibid,* p. 132.) All attempted administrative limitation of the terms of license under the 1912 law was without authority of law and ineffective. The licenses thereafter issued under the 1912 law were, according to that law, and on their face, licenses for an indefinite and unlimited term, revocable "for cause." (Sec. 1, 37 Stat. 302.)

Appellants hold such licenses; no "cause" has ever been alleged against them.

It has been well said, especially in view of the foregoing, that, "The right to build and operate a radio

transmitting station or receiving set is as natural and inherent as to engage in any other legitimate human activity." (Davis, *The Law of Radio Communication,* p. 14.) And, "In any legal discussion, it is well to keep in mind the realization that conducting radio communication is not a matter of grace or favor, but only one of the manifold modern activities in which anyone may engage, whether for business or pleasure, subject only to the ordinary limitations governing human conduct." (*Ibid.*) As this Court has said, speaking through Chief Justice Marshall:

> "In pursuing this inquiry at the bar, it has been said that the constitution does not confer the right of intercourse between state and state. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true." (*Gibbons* v. *Ogden,* 9 Wheat. 1, 211.)

The protection of broadcasters in the prior use of their apparatus on their established frequencies rested to a great degree on mutual consent, precisely as the protection of the first appropriators of water in our western States rested at first on mutual consent and the predilection for order of a people disciplined by Anglo-Saxon tradition. But in any society some members will disregard the plainest tradition unless it is enforced, and with the opinion of the Attorney General last above mentioned (rendered on July 8, 1926) the question became acute whether the priority of established broadcasters was enforcible at law. It was clear that Federal authority did not protect it. This question received an almost immediate anwer (in November, 1926) in a decision of the Circuit Court of Cook County, Illinois, which restrained an interloper from "interfering" with another and established station in the prior use of its frequency. The result reached by this decision (which is hereafter

referred to) seems inevitable; and it shows the common law institution of property to be entirely adequate to the ultimate elimination of the unjust and anti-social confusion of "interference" upon the same frequency, just as it has been adequate to eliminate the unjust and anti-social confusion of "interference" upon the same plot or tract of the Earth's surface (*Bradshaw* v. *Ashley,* 180 U. S. 59) or the same chattel; or the same sunlight (*Muhlker* v. *N. Y. & Harlem R. R. Co.* 197 U. S. 544).

The Radio Act of 1927 (44 Stat. 1162 *et seq.*) was approved by the President February 23, 1927; the amendment commonly called the Davis Amendment (Sec. 5, 45 Stat. 373) was approved March 28, 1928. It is concerning these enactments the certified questions are asked. This legislation is not aimed at the protection of broadcasters in the prior use of their frequencies and stations. On the contrary, under this legislation the licensing authority thereby created, upon its opinion of "public convenience, interest, or necessity" is to grant licenses or refuse them, no distinction being required between the established broadcaster and the applicant who has not yet entered the field. The 1927 Act provides, in part:

> "That no person, firm, company, or corporation shall use or operate any apparatus for the transmission of energy or communications or signals by radio * * * except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter." (Sec. 1, 44 Stat. 1162.)

It further provides:

> "Any person, firm, company, or corporation, who shall violate any provision of this chapter * * * shall be punished by fine of not more than $5,000 or by imprisonment for a term of not more than five years or both for each and every such offense." (Sec. 33, 44 Stat. 1173.)

The Act (Sec. 39) repealed the Act of 1912, and then provides (the italics are ours):

> "Such repeal, however, shall not affect any act done *or any right accrued* or any suit or proceeding had or commenced in any civil cause prior to said repeal, but all liabilities under said laws shall continue and may be enforced in the same manner as if committed; and all penalties, forfeitures, or liabilities incurred prior to the taking effect hereof, under any law embraced in, changed, modified, or repealed by this chapter, may be prosecuted and punished in the same manner and with the same effect as if this chapter had not been passed.
>
> *Nothing in this section shall be construed as authorizing any person now using or operating any apparatus for the transmission of radio energy or radio communications or signals to continue such use except under and in accordance with this chapter and with a license granted in accordance with the authority herein before conferred.*" (Sec. 39, 44 Stat. 1174, 47 USCA, sec. 118.)

The Act further provides:

> "This Act shall take effect and be in force upon its passage and approval, except that for and during a period of sixty days after such approval no holder of a license or an extension thereof issued by the Secretary of Commerce under said Act of August 13, 1912, shall be subject to the penalties provided herein for operating a station without the license herein required." (Sec. 40, 44 Stat. 1174.)

There can be no doubt that under the provisions quoted Congress meant to take away "any right accrued," to operate a broadcasting station and, after the sixty-day suspension, to subject anyone, though he had been broadcasting since 1925, had a large investment, and held the indeterminate license of the Federal government, revocable only "for cause," to the penalties of this new act, if an administrative commission concluded that he did not

serve "public convenience, interest, or necessity."[1] But even this is not the full scope of the legislation which is invoked to oust appellants.

It will be borne in mind that appellants do not and have not "interfered" with any other prior stations. Under the 1927 Act as passed, the licensing authority (the Federal Radio Commission) while disregarding priorities to some extent from the first, undertook little more than the elimination of "interference" all over the country, and, in a nation-wide adjustment of frequencies for this purpose, appellants reduced their frequency by 10 kilocycles to accommodate the national scheme. After the Act was passed, appellants replaced some of their machinery with new and expensive apparatus. And—it was part of the national scheme fostered by the Commis-

[1] Mr. Frank D. Scott, floor manager for the Committee on the floor of the House responded to inquiry during the debate on the bill in January, 1927, as follows:

"Mr. Williamson: I should like to inquire with reference to the existing stations that have been built in recent months. It is a well-known fact that a good many stations have been erected within recent months in anticipation of this legislation, in order to obtain a standing or perhaps a preferred status prior to the enactment of the legislation. Will there be any way, under the legislation now proposed, to reduce in any way the number of these stations in some of our large cities?

"Mr. Scott. Such authority is conferred in this bill upon the radio commission during the first year. They have jurisdiction over the entire subject and can determine the necessity of the stations, having in mind the welfare and interests of the public; having in mind the welfare of the listening public, and with that in mind and with the authority which the Congress will confer, if they enforce this law, the commission, which is representative of the various sections of the country, will amply safeguard the interests of the listening public." (Cong. Rec., Vol. 68, Part 3, p. 2565.) This colloquy occured in February, 1927. It will be borne in mind that appellants' business was established in 1925. (Certificate, 2.) The Act falls on the just and the unjust alike. The reference to "the first year" is to the fact that the Commission's powers were at first for one year only. Congress later continued them.

sion—appellants received a "construction permit" (Sec. 21, 44, Stat. 1170) for this expensive replacement, which was issued to them by the Commission on August 3, 1927, on a finding by it that "public interest, convenience or necessity" would be served thereby. (Certificate, 3.) Afterwards, on March 28, 1928, Congress passed the Davis Amendment[1] and in obedience thereto (Certificate, 7) its commission undertook to *equalize* the number of broadcasting studios according to population and geographical distribution. The amendment is a mandatory direction to bring about "equalization." The language of the amendment makes plain[2] and the replies

[1] Act of Congress, March 28, 1928, c. 263, sec. 5, 45 Stat. 373.

[2] Act of Congress, March 28, 1928, c. 263, sec. 5, 45 Stat. 373, 47 USCA, sec. 89 (The "Davis Amendment") provides, in part: "It is hereby declared that the people of all the zones established by section 82 of this chapter are entitled to equality of radio broadcasting service, both of transmission and of reception, and in order to provide said equality the licensing authority shall as nearly as possible make and maintain an equal allocation of broadcasting licenses, of bands of frequency or wave lengths, of periods of time for operation, and of station power, to each of said zones when and in so far as there are applications therefor; and shall make a fair and equitable allocation of licenses, wave lengths, time for operation, and station power to each of the States, the District of Columbia, the Territories and possessions of the United States within each zone, according to population. The licensing authority shall carry into effect the equality of broadcasting service hereinbefore directed, whenever necessary or proper, by granting or refusing licenses or renewals of licenses," etc. Further: "Allocations shall be charged to the State, District, Territory, or possession wherein the *studio* of the station is located and *not where the transmitter* is located." (Our Italics.) By amendment (Sec. 3 of the Act of March 28, 1928, c. 263, 45 Stat. 373 [and Sec. 3, Act of March 4, 1929, c. 701, 45 Stat. 1559]), it was provided: "Prior to January 1, 1931, the licensing authority shall grant no license or renewal of license under the Radio Act of 1927 for a broadcasting station for a period to exceed three months * * *." The provisions of the original Act were retained.

and statements of Senator Dill, in charge of the amendment for the Committee on the floor of the Senate emphasize, that this amendment was made because under the Act as passed the Commission was not destroying established businesses for the sake of equality, with the ruthlessness intended by Congress. The following is reported in 69 Cong. Rec. Part 5, pp. 5160, 5161, 70th Congress:

> "Mr. McKellar: As I understand the Senator, he thinks that the chief fault lies in the action of the present commission.
>
> Mr. Dill: I do. I want to say further that in my judgment if the commission had carried out the law as it is now written, this legislation would not have been necessary. The present law provides that the licensing authority shall distribute these wave lengths and power in such a way as to give all the people of the various States and communities fair, efficient, and equitable radio service. They have distorted the interpretation of that into meaning that they must give a New York program to somebody down in southern Texas, or out in Colorado, even though there is no chain, and therefore they defend these high-power stations. It never was intended by Congress. There is no good defense of it, in my judgment."

And a moment later:

> "Mr. Dill: It is a very striking fact to me that the man who was put on the commission last and who would be supposed to know least about its work, or was supposed to know least about it, is doing the most to correct the situation."

And again:

> "Mr. Edge: As I follow the Senator—and I am inclined to a great extent to accept his views—there is nothing materially wrong with the law.
>
> Mr. Dill: I do not think so.
>
> Mr. Edge: It is a question of its administration.
>
> Mr. Dill: *But the commission has taken the position that there is an ambiguous wording in the equi-*

table service provision, and so we have tried to write this language so clearly that there could not be any doubt about what we mean. All of the qualifying phrases are for the purpose of making clear that Congress desires the commission to divide licenses, wave lengths, time of operation, and power *equally* among the five zones.

Mr. Edge: In other words, the Senator is now trying to direct them, as far as it is possible in a more or less involved mechanical responsibility, about making an equitable division.

Mr. Dill: Absolutely. *This legislation should not be necessary at all, and if we had a commission which would carry out the purposes of Congress it would not be necessary.* For instance, we have put in certain directions as to how the commission is to provide the equality of service which we have declared the people of each zone to be entitled to. When we said 'equality of service,' 'both of transmission and reception,' we have gone ahead and *explained the meaning by directing that the commission shall allocate as nearly equal as possible the licenses, wave lengths, time of operation, and station power. We do not mean equality of transmission and reception in terms of high-power stations in the East for listeners in the South and West. We mean equality in terms of licenses, wave length, time of operation, and station power. Any other interpretation is false and in defiance of the purpose of this provision.* • • •

Mr. Dill: There is some ground for difference of opinion about the meaning of equitable service, but *I take it there can be no difference of opinion as to what is meant by equality of service when we say 'both of transmission and of reception,' and then, in order to secure that equality, we command the commission to make an equal distribution* of wave lengths, power, time of operation, and station power." (Italics ours.)

Under the Act, as so amended, the Commission withheld a license from appellants; it "assigned" appellants' frequency on which they had been operating with the Commission's entire approval to another zone, and li-

censed persons in Texas[1] to use their frequency—persons who had never used that frequency before.

CONTENTIONS: The Government contends that Congress and its agency can, without compensation, oust a station which interferes with no other existing station in order to bring about "equality;" that because the agency of Congress, pursuant to this Act and amendment, has withheld a license, therefore appellants are validly exposed to the absolute prohibition of the Act; that the national legislature, through its amended statute and the order of its agency, has validly deprived appellants of their going business, the use of their studio and machinery (much of the latter having just been replaced with expensive apparatus in entire conformity with the Commission's national scheme, upon a finding by the Commission that public interest, convenience or necessity would be served thereby); that Congress and its agency have validly given the use which appellants made of their studio and machinery to two other persons engaged in the broadcasting business whose studios, being located in Texas, carry out the equalization directed by the amendment.

Appellants contend that their property has been taken without just compensation and without due process of law.

---

[1] (Certificate, bottom p. 6, top p. 7. These, only, are the "one or more" stations between whom and appellants "interference" would exist.)

FOURTH.

ARGUMENT.

A. APPELLANTS HAD A PROPERTY.

I. Priority of Use Gives a Property Right.

The only case which seems to have arisen as to the right of a broadcaster to enjoin an interfering station was decided in Illinois, where these appellants are. It is an unreported decision by Judge Francis S. Wilson, in the Circuit Court of Cook County, Illinois. It is quoted in the Congressional Record, Vol. 68, Part 1, pages 216-219. Judge Wilson held on established principles that "under the circumstances of this case, priority of time creates a superiority in right," and granted a temporary injunction restraining the interferer.[1] The decision of this Illinois court finds strong support in natural justice. It finds equally strong support in the decisions of the courts as to practically every newly-discovered field of

[1] *Tribune Company* v. *Oak Leaves Broadcasting Station,* Cir. Ct. of Cook County, Ill. This decision refutes the Government's suggestion that law had "broken down" or, as the same suggestion was put by the District Court's opinion, that "in the resulting confusion both broadcasters and receivers would lose everything." Moreover, the Government does not contend that appellants interfered with any station. In fact, they were operating machinery which they had installed at large expense on a finding by the Commission that it would "serve the public interest, convenience or necessity." After that finding, the Davis amendment was passed, directing equalization. Appellants are ousted, not in the name of interference, but in the name of equalization. The Act aims at equalization, viz., to take what appellants have because they are in Illinois and to give it to other persons because they are in Texas. The elimination of "interference" (which admittedly did not exist as to appellants) is not the justification for equalization.

human use with reference to which the question has arisen.

The superior right of the first appropriator of water in the western States is eloquently described by Mr. Justice Field in *Jennison* v. *Kirk,* 98 U. S. 453 at pages 457, 458:

> "The discovery of gold in California was followed, as is well known, by an immense immigration into the State, which increased its population within three or four years from a few thousand to several hundred thousand. The lands in which the precious metals were found belonged to the United States, and were unsurveyed, and not open, by law, to occupation and settlement. Little was known of them further than that they were situated in the Sierra Nevada mountains. Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches, and canyons, and probing the earth in all directions for the precious metals. Wherever they went, they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines; distinct provisions being made for different kinds of mining, such as placer mining, quartz mining, and mining in drifts or tunnels. They all recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. And they were so framed as to secure to all comers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the lawmakers, as respects mining, upon the public lands in the State. The first appropriator was everywhere

held to have, within certain well-defined limits, a better right than others to the claims taken up; and in all controversies, except as against the government, he was regarded as the original owner, from whom title was to be traced. But the mines could not be worked without water. Without water the gold would remain forever buried in the earth or rock. To carry water to mining localities, when they were not on the banks of a stream or lake, became, therefore, an important and necessary business in carrying on mining. Here, also, the first appropriator of water to be conveyed to such localities for mining or other beneficial purposes, was recognized as having, to the extent of actual use, the better right. The doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of miners in the mountains. The waters of rivers and lakes were consequently carried great distances in ditches and flumes, constructed with vast labor and enormous expenditures of money, along the sides of mountains and through canyons and ravines, to supply communities engaged in mining, as well as for agriculturists and ordinary consumption. Numerous regulations were adopted, or assumed to exist, from their obvious justness, for the security of these ditches and flumes, and the protection of rights to water, not only between different appropriators, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the State courts, and received their sanction; and properties to the value of many millions rested upon them. For eighteen years—from 1848 to 1866—the regulations and customs of miners, as enforced and molded by the courts and sanctioned by the legislation of the State, constituted the law governing property in mines and in water on the public mineral lands."

Again writing for the Court in *Atchison* v. *Peterson*, 20 Wall. 507, Mr. Justice Field said, with respect to the rights of the first appropriator of water (page 512):

"And he who first connects his own labor with property thus situated and open to general explora-

> tion, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the specific states and territories by their customs, usages, and regulations everywhere recognized the inherent justice of this principle; * * *."

The same rule of priority of appropriation controls in trade-mark cases. In *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, this Court said (page 415):

> "Expressions are found in many of the cases to the effect that the exclusive right to the use of a trade-mark is founded on priority of appropriation. Thus, in *Canal Co.* v. *Clark*, 13 Wall. 311, 323, reference is made to 'the first appropriator'; in *McLean* v. *Fleming*, 96 U. S. 245, 251, to 'the person who first adopted the stamp'; in *Manufacturing Co.* v. *Trainer*, 101 U. S. 51, 53, the expression is 'any symbol or device, not previously appropriated, which will distinguish,' etc. But these expressions are to be understood in their application to the facts of the cases decided. In the ordinary case of parties competing under the same mark in the same market, it is correct to say that prior appropriation settles the question."

Again in determining the respective rights of public utilities companies operating in the same field, priority of time gives superiority of right. *Los Angeles Gas and Electric Co.* v. *City of Los Angeles*, 241 Fed. 912 (affirmed 251 U. S. 32), was a case in which the City of Los Angeles, by ordinance, attempted to compel a public utilities company occupying the streets of Los Angeles to relocate its poles and apparatus in order to make room for a municipal lighting system. The District Court said (pp. 919-20):

> "When, however, pursuant to the terms of its lawful franchise, it has established its poles and wires and other instrumentalities in the public streets, it may lawfully and properly object to being compelled to remove or relocate them in order that another company, a competitor of later origin and

right coming in, may take their place and thereby be enabled to carry on its own intended business. In other words, in this as in many other relations, first in time is first in right, and superiority of right consequent upon being first in time may not be nullified by even necessary requirements of a competitor or other utility later in time and therefore inferior in right. *Edison Electric Light & Power Co.* v. *Merchants' & Manufacturers' Co.*, 200 Pa. 209, 219, 49 Atl. 766, 86 Am. St. Rep. 712; *Paris Electric Light Co.* v. *Southwestern Telegraph Co.* (Tex. Civ. App.) 27 S. W. 902; *Rutland Electric Light Co.* v. *Marble City Electric Light Co.* 65 Vt. 377, 26 Atl. 635, 20 L. R. A. 821, 36 Am. St. Rep. 868. In 200 Pa. 209, 219, 49 Atl. 766, 767, 86 Am. St. Rep. 712, the Supreme Court of Pennsylvania said:

> 'As between two corporations exercising similar franchises upon the same streets, priority carries superiority of right. Equity will adjust the conflicting interests as far as possible and control both so that each company may exercise its own franchises as fully as is compatible with the necessary exercise of the other's. But, if limitation or interference of one or the other are unavoidable, the later must give way, and the fact that it is under contract with the city for work of a public nature does not alter its position, or give it any claim to preference.'

"By the same token, the fact that the later corporation is the city itself, instead of being 'under contract with the city for work of a public nature,' would create no rights superior to those of the earlier occupant of the field. This case was approved by the same court in *Edison Electric Co.* v. *Citizens' Electric Co.* 235 Pa. 492, 507, 84 Atl. 438. See, also, *Bell Telephone Co.* v. *Belleville Electric Co.* 12 Ont. Rep. (Queen's Bench Div.) 571; *Western Union Tel. & Tel. Co.* v. *Los Angeles Electric Co.* (C. C.) 76 Fed. 178."

In affirming the judgment, the Supreme Court of the United States said (251 U. S., 32, 40):

> "It will be observed that we are not concerned with the duty of the corporation operating a public utility to yield uncompensated obedience to a police

measure adopted for the protection of the public, but with a proposed uncompensated taking or disturbance of what belongs to one lighting system in order to make way for another."

In this present case the Act in question goes much further; it does not merely require appellants to make room for others by changing the use or location of facilities; it requires appellants to go out of business and cease using their facilities altogether, in order to make room for two other persons located in Texas. Judge Davis, in his treatise on the law of radio communication, refers to these general principles and states on page 131:

> "As applied to broadcasting stations prior to the exertion of regulatory authority under the Radio Act of 1927, it must be concluded that the courts would protect the one first in the field as against interference from a newcomer, in spite of the novelty of the situation. *For while the specific condition was new, the general principle was old and well established.* It furnished the only basis for determination. It must be remembered that the builder of the last station was not confined to any particular locality nor to any particular wave length. Under the 1912 law, he might choose both location and channel at his will, having regard only to the conditions of his neighbors. If he finds that wave lengths available for use in a certain locality are all appropriated by others, that is the penalty he pays for being late." (Italics ours.)

In the language of an earlier writer:

> "The right of the first owner (*jus praeventionis*) should be faithfully observed in the use of common things which cannot be used by several persons at the same time." (Vattel, *Law of Nations*, Vol. III, p. 84.)

The right of stations WOK-WMBB to carry on a broadcasting business on a "cleared channel" was firmly established prior to the Radio Act of 1927. This right, to be free from interference of stations which might sub-

sequently seek to take over all the available "channels" to their exclusion, was a property right, which gave value to their investment in studio and machinery, station and equipment, and the whole going concern. To deprive appellants of the right to use this property is to deprive them of the property itself. This involves no denial that Congress, under the Interstate Commerce clause of the Constitution may, perhaps, regulate broadcasting. Assuming the power to regulate, that does not include the power to destroy the property of appellants in order to build up the property of other persons. In the Los Angeles case above cited, the City of Los Angeles had the power to regulate the location of poles, etc., *but it could not constitutionally require one electric company to make room for another.*

II. Appellants' Right to Continue Their Legitimate Established Business Was a Property Right Which Could Not Be Confiscated (even for Public Use) Without Just Compensation.

1. The right to continue a legitimate and established business is property. That is the settled doctrine of this Court. *Truax* v. *Corrigan*, 257 U. S. 312. This Court there held a statute denying injunctions in labor disputes to be an unconstitutional taking of business, and said on page 327:

> "Plaintiff's business is a property right (*Duplex Printing Press Co.* v. *Deering* 254 U. S. 443, 465) and free access for employees, owner and customers to his place of business is incident to such right."

In the *Duplex* case, *supra*, this Court said at p. 465:

> "That complainant's business of manufacturing printing presses and disposing of them in commerce is a property right, entitled to protection against unlawful injury or interference; that unrestrained ac-

> cess to the channels of interstate commerce is necessary for the successful conduct of the business * * * is proved by clear and undisputed evidence."

In *Hill Military Academy* v. *Pierce, Governor of Oregon*, 296 Fed. 928 (aff'd. 268 U. S. 510), a statute which required children to attend the public primary schools was held to be an unconstitutional deprivation of the business of conducting private schools, as well as of the physical property of private schools. The lower court held (page 933):

> "It can scarcely be contended that complainants' right to carry on their schools, whether parochial or private, is not a property right, and the right of parents and guardians to send their children and wards to such schools as they may desire, if not in conflict with lawful requirements, is a privilege they inherently are entitled to enjoy. *Meyer* v. *Nebraska, supra*, and *Nebraska District of Evangelical Lutheran Synod* v. *McKelvie et al., supra*, seem to affirm the propositions. See, also, *C., M. & St. Paul. R. R. Co.* v. *Wisconsin*, 238 U. S. 491, 35 Sup. Ct. 869, 59 L. Ed. 1423, L. R. A. 1916A, 1133; *Adkins et al.* v. *Children's Hospital* and *Adkins et al.* v. *Lyons* (Nos. 795, 796) 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785, 24 A. L. R. 1238."

In affirming the decision this Court said (268 U. S. 510, 534):

> "Appellees are corporations and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. *Northwestern Life Ins. Co.* v. *Riggs*, 203 U. S. 243, 255; *Western Turf Association* v. *Greenberg*, 204 U. S. 359, 363. But they have *business* and *property* for which they claim protection. *These* are threatened with *destruction* through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action. *Truax* v. *Raich*, 239 U. S. 33; *Truax* v. *Corrigan*, 257 U. S. 312; *Terrace* v. *Thompson*, 263 U. S. 197." (Italics ours.)

2. It is the settled doctrine of the Supreme Court of Illinois, where appellants went into the business, that the right to continue a legitimate and established business is property.

People v. *Love*, 298 Ill. 304, pp. 310, 311:

> "A person's business, profession or occupation is at the same time 'property' within the meaning of the constitutional provision as to due process of law, and is also included in the right to liberty and the pursuit of happiness."

Bailey v. *People*, 190 Ill. 28, p. 33:

> "The guaranty of Section 2 of Article 2 of the Constitution of 1870 is, that no person shall be deprived of liberty or property without due process of law. The term 'property' includes every interest anyone may have in any and everything that is the subject of ownership by man, together with the right to freely possess, use, enjoy and dispose of the same. (citing five Illinois cases) * * * The right to entertain lodgers in a lodging house, and to fix, by contract with them, the price to be paid for such accommodation and the number who shall occupy the same room at the same time for sleeping purposes, is a liberty and also a property right. Any restriction upon or abridgement of this right deprives the citizen of both liberty and property."

a. When appellants went into the business these cases were the law of Illinois, and assured them that their business could not be wholly taken from them without compensation. Property given by State law is protected by the Federal Constitution. See *Muhlker* v. *N. Y. & Harlem R. R. Co.*, 197 U. S. 544, 570, where property given by State law as declared by the former decisions of the highest court of the State was protected even against a change of the law by the State. The property protected was the right to have sunlight and air come over the land of the State.

3. It is the generally accepted rule, that the right to continue a legitimate and established business is property.

State v. *Chapman*, 69 N. J. Law 464, 55 Atl. 94, 95:

> "A calling, business, or profession chosen and followed is property."

Purvis v. *Local No. 500*, 214 Pa. 348, 63 Atl. 585, pp. 588-589:

> "The business of the plaintiffs is 'property' within the meaning of the law."

State v. *Cadigan*, 73 Vt. 245, 50 Atl. 1079, 1081:

> "No state shall 'deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' * * * To deprive one of the right to labor and transact business is to deprive him of his liberty, and also of his property."

Stearns Lumber Co. v. *Howlett*, 157 N. E. (Mass.) 82, 86:

> "The right to carry on a lawful business is a property right, protected by the common law and guaranteed by the organic law of the state. *Godin* v. *Niebuhr*, 236 Mass. 350, 351; 128 N. E. 407."

See *accord*: *Wood* v. *Security Mutual Life Insurance Co.*, 112 Neb. 66; *Gallardo* v. *Questell*, 29 Fed. (2d) 897 (C. C. A. 1st, 1928).

a. An absolute requisite of due process of law is compensation. "Property" means the same in describing what is protected against governmental confiscation in the Fifth and in the Fourteenth Amendments.

Holden v. *Hardy*, 169 U. S. 366, 390.

Norwood v. *Baker*, 172 U. S. 269, 277.

Monongahela Navigation Co. v. *U. S.*, 148 U. S. 312.

Fairbank v. *U. S.*, 181 U. S. 283.

Minnesota Rate Cases, 230 U. S. 352, 434.

4. The power of the Federal Government to regulate commerce is subject to all the limitations of the Fifth Amendment. This Court held in *U. S.* v. *Lynah*, 188 U. S. 445, 471:

> "But if any one proposition can be considered as settled by the decisions of this court it is that, although in the discharge of its duties the government may appropriate property, it cannot do so without being liable to the obligation cast by the Fifth Amendment of paying just compensation.
>
> In *Monongahela Navigation Company* v. *United States*, 148 U. S. 312, 336, it was said:
>
> 'But like the other powers granted to Congress by the Constitution, *the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment* we have hitherto quoted. Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation.'
>
> In that case Congress had passed an act for condemning what was known as 'the upper lock and dam of the Monongahela Navigation Company,' and provided 'that in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls should not be considered or estimated,' but we held that this proviso was beyond the power of Congress; that it could not appropriate the property of the navigation company without paying its full value, and that a part of that value consisted in the franchise to take tolls." (Italics ours.)

5. The going value of a business is property in the constitutional sense.

Even though it is a business devoted to public use in the fullest sense, and affected with incomparably more vital public interests, the regulatory power is not the power to confiscate going value, by fixing a rate which

takes no account of that going value. *A fortiori it is not power to forbid all operation and confiscate the going value and the whole business.*

In *McCardle* v. *Indianapolis Water Company*, 272 U. S. 400, this Court sustained a decree of the District court which enjoined enforcement of an order of a Public Service Commission fixing rates of a public utility, on the ground that the rates were confiscatory because they did not (p. 403) "constitute just compensation safeguarded by the Fourteenth Amendment." At p. 414 the Court said:

> "The decisions of this court declare: 'That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. This element of value is a property right, and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use.' *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153, 165; *Denver* v. *Denver Union Water Co.* 246 U. S. 178, 191, 192. And see *National Water Works Co.* v. *Kansas City*, 62 Fed. 853, 865; *Omaha* v. *Omaha Water Co.* 218 U. S. 180, 202, 203 and cases cited."

B. APPELLANTS' PROPERTY WAS TAKEN.

I. To forbid the owners of this established business, having priority in the field, to carry it on at all, anywhere, at any time, or under any regulations, is a "taking" and a "deprivation," both of the business and its physical property, for which there must be compensation.

There is no flesh and blood meaning in the cases which hold that priority gives property, and that the right to carry on legitimate and established business is property which cannot be confiscated, unless it is held that when the owner of an established business, having priority, is

directly and deliberately forbidden to continue *at all,* in order that others may do so, there is a taking and a deprivation—as distinguished from damage, or consequential injury.

Suppose Congress should conceive that it would serve public convenience, interest or necessity if the Government should do all the broadcasting, and should forbid appellants' operation in order to make room for itself. Perhaps it would be conceded Congress could not thus take appellants' business without compensation. Surely it makes the case no better when, for the same reason, an administrative agency of Congress is allowed to forbid appellants' operation in order to make room *for other private persons* as Congressional licensees. A business is taken from its owner by forbidding him to carry it on. The private owner loses his property, whether Congress gets it or gives it to its licensee.

The right of a prior user to continue in a limited field is property; the right to continue a legitimate and established business is property; appellants had such property and by these acts of Congress it would be *directly and purposely destroyed.* It is exactly at this property that the legislative action is aimed. This is direct and total destruction. Even the partial destruction caused by a confiscatory utility rate, though it leaves the owner the cold comfort of possession and partial use of every physical facility, is an unconstitutional taking. The rule is: "the power to regulate is not the power to destroy, and regulation is not the equivalent of confiscation." It is well settled that this rule protects public utilities engaged in interstate commerce from destruction of the intangible values that inhere in the use of their facilities.

Railroad Commission Cases, 116 U. S. 307, 331.

Covington Turnpike Co. v. *Sandford*, 164 U. S. 578, 594.

Smyth v. *Ames*, 169 U. S. 466, 523.

Lake Shore & Michigan Southern Railway Co. v. *Smith*, 173 U. S. 684, 687-690.

The Minnesota Rate Cases, 230 U. S. 352, 434.

And see:

McCardle v. *Indianapolis Water Co.*, 272 U. S. 400, 403, 414.

If Congress should enact that the owner of a "public utility" should charge nothing, it still would not be going quite so far as in this present case. Congress here forbade the owners to operate at all. And by the licensing scheme Congress adopted it not only takes appellants' property—it takes it in order to give it to somebody else.

As to the second part of the first two questions certified, they inquire whether appellants had a property right to continue their use of their (fully equipped) studio, its site, and the machinery.[1] This business had physical facilities worth well over $100,000, a substantial portion of which were acquired and in use before the 1927 Act,[2] the balance being a replacement of machinery installed consistently with the Government's national plan to eliminate interference under the 1927 Act as originally passed, pursuant to a finding made by the Commission before the Davis Amendment, that public interest, convenience or necessity would be served thereby.[3] All of this physical property would be even more worthless to appellants than its cars and tracks would be to a railroad; appellants could not find a market even among

[1] Certificate, pp. 8, 2, 6.

[2] Certificate, pp. 2, 6; *vide supra*, p. 6.

[3] *Vide supra*, p. 15; Certificate, p. 3.

their competitors. Appellants have, in good faith, and with the affirmative encouragement of the Government, made this large investment of their own substance and effort. It was made in entire accord with the nation-wide scheme of the Federal Government, and on a finding of its Commission that public interest, convenience or necessity would be served thereby. Congress would make it as worthless to appellants as the keg of Spanish dollars was to Robinson Crusoe. To take the use of property takes the property. Even the exertion of the police power in the strict sense, must know limits; and, we submit, even that power stops short of taking the use of property to this degree. As stated by Mr. Justice Holmes, speaking for the Court in *Martin* v. *District of Columbia*, 205 U. S. 135, 139:

> "To illustrate: Under the police power, in its strict sense, a certain limit might be set to the height of buildings without compensation; but to make that limit five feet would require compensation and a taking by eminent domain."

The property would not be physically invaded and it could still be used for a flower garden, or a truck patch or chicken yard; but there would have to be compensation. The primary use would be gone. The above illustration was evidently put as an extreme case and very plain example. But when Government says that a broadcasting station cannot be used for broadcasting the case is even stronger. If "taking" were held to require "physical" invasion the amendment would be emasculated; it could generally be avoided if government could still say to the individual, whom the amendment was meant to protect: "Keep your cars, or your building lot, or your broadcasting station, but do not use them for railroad purposes except at a one per cent profit, or for a building except one five feet high, or for

radio purposes *at all;* you can have no compensation, for, as your property is not *physically* invaded, you are only consequentially damaged by a uniform statute enacted in the public interest!"

As this Court has said:

> "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." (*Pumpelly* v. *Green Bay Co.*, 80 U. S. 166, 177.)

See accord: *United States* v. *Cress*, 243 U. S. 316, 321.

Buchanan v. *Warley*, 245 U. S. 60, involved an ordinance providing that real property should not be sold to colored people. This Court condemned it as a deprivation of property, and said on page 74:

> "The Fourteenth Amendment protects life, liberty, and property from invasion by the States without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essen-

tial attributes of property. *Holden* v. *Hardy,* 169 U. S. 366, 391. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land. 1 Blackstone's Commentaries (Cooley's Ed.), 127."

In the District Court the Government refrained from making the contention that the present Act is an exercise of Federal powers analogous to the police powers of the States. And, we submit, the cases cited show, first, that here there is a taking—a taking of business by forbidding its owner to carry it on under any conditions or regulations at all; and second a taking of property by extreme impairment of its use; third, that when such taking is established all discussion of police power is beside the point. For even if this act were an exercise of police power, strictly so-called (which, we submit, it manifestly is not), the authorities cited establish that there would have to be compensation when the taking goes so far.

The District Court, however, relied upon those cases of which the *Slaughterhouse Cases* (83 U. S. 36) are the leading example. But in the *Slaughterhouse Cases* themselves, this Court recognized that the right to carry on a business is property; it dwelt upon the fact that *the butchers of New Orleans were not forbidden to carry on their business;* that, on the contrary, the legislative body had carefully preserved that right by express provisions, and only required them to carry on part of their business (the slaughtering) at certain places. The majority said (page 61):

"The statute under consideration defines these localities and forbids slaughtering in any other. It does not, as has been asserted, prevent the butcher from doing his own slaughtering. On the contrary, the Slaughter-house Company is required, under a heavy penalty, to permit any person who wishes to

> do so, to slaughter in their houses; and they are bound to make ample provision for the convenience of all the slaughtering for the entire city. The butcher then is still permitted to slaughter, to prepare, and to sell his own meats; but he is required to slaughter at a specified place and to pay a reasonable compensation for the use of the accommodations furnished him at that place."

The full weight which the majority put on this distinction appears from the dissenting opinions. We submit, the crucial question of whether the right of the individual to continue his business has been destroyed or preserved, deserves the emphasis this Court gave it. It marks the difference between regulation and confiscation. In *Adams* v. *Tanner*, 244 U. S. 590, a statute enacted in exercise of the police power, destroyed the business of securing work for unemployed in return for stipulated fees. At page 594 this Court held:

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about with *proper regulations*. But this is not enough to justify *destruction* of one's right to follow a distinctly useful calling in an upright way." (Italics ours.)

In this present case appellants are forbidden to carry on their business at all, anywhere, at any time, or under any regulations. Congress would destroy their business, their priority and the value of the large investment they have made with the encouragement of Congress, without compensation. The difference between the statute in the *Slaughter House Cases* and this present statute is, at least, the large difference between reasonable *regulation* in the interest of public health, and impatient *destruction* in the interest of public entertainment.

Public interests are of different degrees of urgency. It is common knowledge that the public interest in broad-

casting is the interest in entertainment.[1] The public will always have exactly what it wants of broadcasting; the motive of the broadcaster is to get the widest possible audience. The statute takes broadcasting as it is, and makes no attempt to set up Government as an arbiter of taste. Congress could scarcely compel the public to listen to improving discourses if it does not want to, and to require the public to use its radio sets to listen to improving discourses, instead of the entertainment it prefers, would be an unconstitutional taking of the liberty of the public, to say nothing of the property of the broadcasters. In judging of the intent of this Act we submit it is safe to say with positiveness that Congress did not strike at the liberty of the public, whatever it may have done to the property of the broadcasters. If any opinion as to what broadcasting may be at some time in the future affects the consideration of laws passed with reference to broadcasting as it existed in 1927 and 1928 and remains today, then the very nature of broadcasting apparently gives its present character permanence. People cannot be made to spend money for radio sets and to listen; what they want is entertainment; unless people listen, broadcasting is useless. Realistically, broadcasting is the business of advertising by means of public entertainment, and the public interest in broadcasting is entertainment, as almost a decade of experience confirms. That interest will not warrant even the *regulation* involved in fixing the prices of a public theatre. *Tyson & Bro.* v. *Banton*, 273 U. S. 418. *A fortiori* it will not warrant the *destruction* involved in forbidding the continuance of a broadcasting business and taking away the use of its physical property. In the *Tyson* case, *supra*, this Court said on pp. 429-431:

"The power to regulate property, services or

[1] The public interest in the advertising feature is "doubtless" too slight to count.

business can be invoked only under special circumstances; and it does not follow that because the power may exist to regulate in some particulars it exists to regulate in others or in all.

"The authority to regulate the conduct of a business or to require a license, comes from a branch of the police power which may be quite distinct from the power to fix prices. * * *

"A business is not affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowly as strictly denoting 'a right,' that synonym more nearly than any other expresses the sense in which it is to be understood.

"The characterizations in some decisions of businesses as '*quasi* public,' *People* v. *King*, 110 N. Y. 418, 428, 'not "strictly" private,' *Aaron* v. *Ward*, 203 N. Y. 351, 356, and the like, while well enough for the purpose for which they were employed, namely, as a basis for upholding police regulations in respect of the conduct of particular businesses, cannot be accepted as equivalents for the description 'affected with a public interest,' as that phrase is used in the decisions of this court as the basis for legislative regulation of prices. The latter power is not only a more definite and serious invasion of the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on."

At page 440 this Court said that the activities of a theatre "are not such that their enjoyment can be regarded under any conditions from the point of view of an emergency," and proceeded:

"The interest of the public in theatres and other places of *entertainment* may be more nearly, and with better reason, assimilated to the like interest in

provision stores and markets and in the rental of houses and apartments for residence purposes; although in importance it falls below such an interest in the proportion that food and shelter are of more moment than amusement or instruction. As we have shown, there is no legislative power to *fix the prices of provisions or clothing* or the rental charges for houses or apartments, in the absence of some controlling emergency; *and we are unable to perceive any dissimilarities of such quality or degree as to justify a different rule in respect of amusements and entertainments.*" (Italics ours.)

History, expediency, and the decisions of this Court make plain, that the public interest in transportation (common carriers) and shelter (inn-keepers) is of a different degree of urgency than the public interest in news (newspapers) or entertainment (theatres and broadcasting).

The public interest in broadcasting is entertainment; the elimination of interference could be accomplished by many less drastic means,[1] and the degree of destruction involved in shutting up established broadcasting stations is very high. In *Pennsylvania Co.* v. *Mahon*, 260 U. S. 393, a statute required coal mining companies which had acquired special rights to mine coal to leave pillars under dwellings, cities, and highways. The public interest involved was *safety*. This Court held that the statute was void as an uncompensated deprivation of property, and said at page 414:

"'For practical purposes, the right to coal con-

[1] When the Congressional Committee invited the co-operation of the American Bar Association that body recommended that a license fee be exacted sufficient to produce funds to compensate broadcasters whom Congress desired to close up. Thus the broadcasters would pay the cost of their protection, and the public would still get its entertainment free. Congress was not impressed; it was out for "equalization" which is much more expensive than protection from interference. (Cf. explanatory statements of floor managers, pages 14, 16, 17, *supra*, and language of Davis Amendment, footnote 2, p. 15, *supra*.)

sists in the right to mine it.' *Commonwealth* v. *Clearview Coal Co.*, 256 Pa. St. 328, 331. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does."

And, at pp. 415-416:

"The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston* v. *Danville & Western Ry. Co.*, 208 U. S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

"The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking * * * In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. *Spade* v. *Lynn & Boston R. R. Co.*, 172 Mass. 488, 489. *We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.* As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court. The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary *emergency* and providing for *compensation* determined to be reasonable by an impartial board. *They went to the verge of the law* but fell far short of the present act. *Block* v. *Hirsh*, 256 U. S. 135. *Marcus Brown Holding Co.*

v. *Feldman*, 256 U. S. 170. *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242.

"We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But *the question at bottom is upon whom the loss of the changes desired should fall.*" (Italics ours.)

II. *The Contention Relied on to Warrant Taking Appellants' Property Without Compensation Is a Specious Argument as to "The Nature of Things."*

The District Court denied these contentions, on the ground advanced by counsel for the Government, and stated in the opinion:

"In the very nature of things, there can be no right to the use of any particular frequency or wave length, or of the ether as against the legitimate exercise of the regulatory power of the United States."[1]

This, we respectfully submit, begs the question three times.

1. The exercise of power here attempted is not legitimate nor regulatory, but confiscatory, and therefore illegitimate.

It is not within the "legitimate" powers of Congress over interstate commerce to confiscate private property without just compensation; the Fifth Amendment forbids it. The "regulatory power of the United States" is not the power of confiscation.

2. Property does not rest on the nature of things, but on established legal institutions on which appellants, in making their investment, were entitled to rely.

Property is not a subtle exhalation from "the nature of things"; in the nature of things there is no such thing as property at all. Property is established

[1] 31 Fed. (2d) 448, 456.

rules and principles of right, institutionalized by law. The *ratio decidendi* of the District Court assume that we can ascertain property by considering the nature of things—things, moreover, of whose nature we are really ignorant. Property is ascertained by consulting the nature of human institutions. By our institutions, the individual's right to continue his business is property, and when, in the interest of public entertainment (or even transportation) he is absolutely forbidden to carry it on, that property is confiscated; the individual's right of priority in a limited field, gives a property right, and when he is put out of the field so that others may enter it, the property is taken; the individual's right to the use of his possessions is property, and when deprivation of use goes to the present extreme, for the present purposes, it cannot be disguised as regulation—it is confiscation. Large investments made on the faith of legal institutions cannot be suddenly destroyed by speculations as to the nature of things.

Put to one side, for the moment, the appellants' property in business and facilities. As to the right of priority alone, "the general principle was old and well established." If by "the nature of things" is meant what has sometimes been called natural justice, then, we submit, the principal of priority is the most natural justice.

> "Sir Henry Maine has made it fashionable to connect the archaic notion of property with prescription. But the connection is further back than the first recorded history. It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest in-

stincts of man." (Holmes, *The Path of the Law* (1897) 10 Harvard Law Review, 457, 476-7.)

One of the first principles of property institutionalized in law by civilized society, is the principle of priority.

> "* * * that which belongs to nobody is acquired by the natural law by the person who first possesses it." (Digest, Book 41, Tit. 1, De Adquir, Rer. Dom.)

A principle of property which has been applied to new fields of human use since Justinian's time, through the settlement of our Western frontier to the decisions of this Court as to the constitutionally protected property rights of public utilities in the public streets (*Los Angeles Gas Case*, 251 U. S. 32), cannot very well be put aside as contrary to the nature of things. On the contrary, it is the law of the land. Radio is a new field of human use; but those who invested their money therein (with Congressional encouragement) are not therefore outlaws. They are entitled to the law of the land. To disregard the established principle of priority to the extent of putting out the prior user and letting somebody else in for the sake of public entertainment, requires compensation according to the rudimentary principles of fair play which have been said to be the vital meaning of "due process of law."

> 3. Speculations as to the nature of the ether are not a constitutional basis for creation of public ownership thereof; nor, if the ether exists, does the Government own it. The attempted analogy of certain navigation cases is metaphysical.

Appellants are told in substance by the Government's contention, that whether appellants will have it so or not, they are claiming private property in the "ether." Regardless of whether there is an ether in the literal sense imagined by the District Court and, at one time, by speculative physics, appellants have a property right to continue their established business

under some reasonable regulations; a property right not to have the use of their large investment confiscated in the name of entertainment and equality; a property right in the priority which they established before the 1927 Act, with the encouragement of Congress, and in the exercise of a natural right. For if there is no "ether," the fact remains that if appellants and the Texas stations licensed by the Federal Government to use their frequency, operate their machinery on that frequency at the same time,—both are frustrated—and appellants were using that frequency first.

Appellants cannot be deprived of their property right by any showing that they used "the ether." If there is an ether, and if appellants used it, then appellants have the property right of prior user therein. The Federal Government does not own it. "Ether" is surely not in the possession of any one, and "possession is the beginning of ownership." (*Missouri* v. *Holland*, 252 U. S. 416, 434). Nor can any one make out a superior claim on the ground that he resides in Texas. Therefore, in order to defeat appellants' priority of use of broadcasting machinery in the broadcasting business, and wipe out their large investment, the Government must not only show that there is an ether; it must also show that in 1925, when appellants went into this business, the Government owned it.

It can do neither. *Ether is not a physical fact; it is a metaphysical speculation.* The history of that speculation is summarized by distinguished scientific authority:

> "Ether, after having been in turn an elastic solid, a jelly, a froth, a conglomeration of gyrostats, was denied a material and substantial nature and put back in the waiting list." (A. S. Eddington, *The Nature of the Physical World*, p. 248.)

To quote a widely read history of philosophy:

> "Science for a hundred years reasoned its way to an 'ether,' which is now in high disfavor with the physicist elite." (Durant, *Story of Philosophy,* p. 184.)

To quote the Federal Radio Commission in one of its publications:

> "The ether is a hypothetical medium. There is no satisfactory definition of it. It is not even known to exist and represents nothing more at present than a conception which the human mind finds necessary in order to explain certain phenomena."

(The Commission overlooked that Einstein has suggested other conceptions which, to many qualified minds, are more adequate explanations.) True, Congress has spoken of "ether," as in the Joint Resolution of December 8, 1926,[1] and of "channels," as in the 1927 Act. But presumably the large powers claimed for Congress under the Commerce Clause stop short of the power of creation. Judge Davis refers to this 1926 resolution (it has since been repealed)[2] and sums up:

> "It is difficult to grasp this theory of ownership. It involves the possibility of title to the nonexistent. Whoever claims ownership of a thing or substance may very properly be required to prove existence before discussing title. Up to this date in legal history, courts have not lent the judicial ear to controversies over the hypothetical." (Davis, *Law of Radio Communication, p.* 15.)

This contention that a literal ether exists, and that moreover the Government owns it "in the nature of things", was regretted by Senator Dill, in charge of the bill for the Committee, in explaining its intent on the floor of Congress (68 Cong. Rec. February 3, 1927, p. 2871):

"Mr. Dill: * * * When we talk about the own-

[1] 44 Stat. 917.

[2] Act of Congress Feb. 23, 1927, c. 169, sec. 39, 44 Stat. 1174.

> ership of the air or the ownership of channels in connection with radio, we only refer as a matter of fact to the ownership of the right to use radio apparatus in a certain manner."
>
> * * * * *
>
> "Mr. Dill: We might declare that we own all the channels, *but we do not.*" (Ibid. p. 2872.) (Italics ours.)

Neither did the Federal Government own the use of appellants' apparatus.

The Federal Government does not own the peculiar property of appellants' mechanical plant, by which manifestations of energy in the listener's radio set occur when it is operated—any more than it owns the tensity of steel, or the "medium" between one mind and another when a bright smile gets a response. We submit that the serious presentation of the idea that a certain doubtful theory of speculative physics constitutes the public domain in order to justify the taking of private property without just compensation, deserves to rank with certain early judicial discussions of witchcraft. The institution of property will have a hard time getting hold of "ether"; but it has a good grip of the right not to be ousted from a legitimate and established business in order that others may enter it; on the right not to be deprived of the beneficial use of one's physical possessions in the name of equality and public entertainment in order that others may use theirs; and the principle that priority in use gives a property right, has settled titles since Justinian.

The Government has supported the idea of a dominant public property right, by the citation of certain cases permitting Congress, without compensation, to remove obstructions to navigable streams and harbors, or, in aid of navigation to place such obstructions therein.

In so far as this supposed analogy rests on the lan-

guage "channels in the ether," we submit it is a play on words.

Any idea that upon the discovery of a natural means of commerce, it inherently belongs to the Government, finds no support in the Constitution, which will be read in vain for any applicable provision. It is an idea, moreover, which has already been rejected by this Court. As stated by Mr. Justice Brewer, speaking for a unanimous Court, in *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 342:

> "* * * It may be suggested that the cases are not parallel, in that in the present there is a natural highway; while in that suggested it is wholly artificial. But the power of Congress is not determined by the character of the highway. Nowhere in the Constitution is there given power in terms over highways, unless it be in that clause to establish post-offices and post-roads. The power which Congress possesses in respect to this taking of property springs from the grant of power to regulate commerce; and the regulation of commerce implies as much control, as far-reaching power, over an artificial as over a natural highway. They are simply the means and instrumentalities of commerce, and the power of Congress to regulate commerce carries with it power over all the means and instrumentalities by which commerce is carried on. There may be differences in the modes and manner of using these different highways, but such differences do not affect or limit that supreme power of Congress to regulate commerce, and in such regulation to control its means and instrumentalities. We are so much accustomed to see artificial highways, such as common roads, turnpike roads and railroads, constructed under the authority of the States, and the improvement of natural highways carried on by the general government, that at the first it might seem that there was some inherent difference in the power of the national government over them. But the grant of power is the same. There are not two clauses of the

> Constitution, each severally applicable to a different kind of highway. * * *"
>
> * * * * * *

And at page 336:

> "But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment, we have heretofore quoted. * * *"

The real basis of this power of the Federal Government over navigable waters is different. It is only an application of the rule which came to this country as part of the common law: that as to navigable waters, the sovereign has the highway use, and is the owner as trustee for the people.

> "They are public highways at common law. The sovereign is trustee for the public, and the use of navigable waters is inalienable." (3 *Kent's Commentaries* (14th Ed. by Mr. John M. Gould author of "Law of Waters,") p. 427.

At the inception of every riparian title, this rule existed. The easement for the highway use existed, and was public property, which could not be alienated, whether by the crown, or the crown's successor in sovereignty.

Everyone who acquired a riparian title thereby had fair notice that here was something he was not acquiring, and such purchasers, not having acquired it, could not transmit it.

Where interstate commerce is concerned, the Federal Government exercises this ancient and dominant property right of the sovereign in navigable waters, by virtue of its authority to regulate such commerce, and no riparian owner can complain when the Government does as it will with its own property—the law established from

a very early date gave the riparian owner fair warning that the stream and its bed, for every purpose incident to navigation and fishery, belonged to the sovereign in trust for the people. For these purposes, the sovereign *owns* both the water and the stream bed, and always has.

Any rights of Congress to erect structures in the beds and waters of navigable streams rest on this ancient right of property in the sovereign, and not on any right to take private property without compensation in the interest of commerce. This is aptly shown by *Hoboken v. Pennsylvania Railroad Company*, 124 U. S. 656. In that case a navigable stream had receded from its original highwater mark, and the legislature had both provided a line in the water beyond which no structure should extend into the stream, and had also provided for the reclamation of the space between the line so fixed in the water, and the exterior lines of the original highwater mark. This space was held to belong to the State to dispose of at pleasure, as against persons claiming rights therein. This Court said on page 688:

> "In the examination of the effect to be given to the riparian laws of the State of New Jersey by the act of April 11, 1864, in connection with the supplementary act of March 31, 1869, *it is to be borne in mind that the lands below high-water mark, constituting the shores and submerged lands of the navigable waters of the State, were, according to its laws, the property of the State as sovereign. Over these lands it had absolute and exclusive dominion, including the right to appropriate them to such uses as might best serve its views of the public interest, subject to the power conferred by the Constitution upon Congress to regulate foreign and interstate commerce.* The object of the legislation in question was evidently to define the relative rights of the State, representing the public sovereignty and interest, and of the owners of land bounded by high-water mark. * * *" (Italics ours.)

And at page 690:

> "The nature of the title in the State to lands under tide-water was thoroughly considered by the Court of Errors and Appeals of New Jersey in the case of *Stevens* v. *Paterson and Newark Railroad Co.* 5 Vroom, (34 N. J. Law), 532. It was there declared (p. 549): 'That all navigable *waters* within the territorial limits of the State, *and the soil* under such waters, belong *in actual propriety* to the public; that the riparian owner by the comomn law has no peculiar rights in this public domain as incidents of his estate, and that the privileges he possesses by the local custom, or by force of the wharf act, to acquire such rights, can, before possession has been taken, be regulated or revoked at the will of the legislature. The result is that there is no legal obstacle to a grant by the legislature to the defendants of that part of the property of the public which lies in front of the lands of the plaintiff, *and which is below high-water mark.*'
>
> "It was, *therefore*, held in that case, that it was competent for the legislative power of the State to grant to a stranger lands constituting the shore of a navigable river under tide-water, below the high-water mark, to be occupied and used with structures and improvements in such a manner as to cut off the access of the riparian owner from his land to the water, and that without making compensation to him for such loss. * * *" (Italics ours.)

As a figurative reference to this long history it may perhaps be said that in the nature of things there is no private property in the waters of a navigable stream. "The nature of things" in the other sense has nothing to do with the rule. When in the exercise of its power to regulate commerce, Government steps beyond the boundaries of its own ancient property right in navigable waters and takes property on the shore, or a property right in a non-navigable stream, by changing the natural condition of the navigable waters, it must pay compensation—the power to regulate commerce gives no right to destroy pri-

vate property. In the recent case of *U. S.* v. *Cress*, 243 U. S. 316, the Federal Government dammed a navigable stream so as to subject one tract to intermittent overflow, and as to another tract, to destroy the fall of a non-navigable tributary which was valuable for water power. The owners of both tracts were held to be entitled to compensation under the Fifth Amendment. This Court said at page 321:

> "* * * by an unbroken current of authorities it has become well established * * * that riparian owners have a right to the enjoyment of the natural flow (of navigable streams) without burden or hindrance imposed by artificial means. * * *"

And at page 326 the Court said:

> "But the authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power, like others, must be exercised, when private property is taken, in subordination to the Fifth Amendment." (Citing, *inter alia*, *Monongahela Navigation Company* v. *United States*, 148 U. S. 312, 336.

See *accord*, *Pumpelly* v. *The Green Bay Company*, 13 Wall. 166, and *United States* v. *Lynah*, 188 U. S. 445.

This case and the authorities it cites make plain that the navigation cases are not authority for any idea that the public has such an interest in commerce as to warrant taking the use of private property without compensation, even though it be the kind of commerce that moves on navigable waters (or on railroads) and which is essential to the very existence of modern society. They are decisively to the contrary. If broadcasting is commerce at all, the predominant commodity it bears is entertainment. *A fortiori* there is no public interest in such "commerce" that will warrant the present confiscatory taking of the use of private property.

That the navigation cases rest on an established common law rule by which there is a public property right in

the beds and waters of such streams, and not on "the nature of things," is also shown by the law of Louisiana, which rests on the somewhat different history of the Civil Law. By Civil Law the public property right includes the shore bordering the stream. By common law it is confined to the stream and its bed. In States whose legal history is that of the common law, government must pay when it takes any of the shore. (*United States* v. *Cress*, *supra*.) But in Louisiana, government can take the shore bordering the stream without compensation. (*Eldridge* v. *Trezevant*, 160 U. S. 452.) If "the nature of things" were the basis of such cases, then it would appear that it is the nature of things in New York or Massachusetts that the government should have a dominant public right only in the stream and its bed; but it is the nature of things in Louisiana that it also owns the bank. The basis of the law is different. The basis of the law is stated in *Eldridge* v. *Trezevant*, *supra*, where this Court, speaking through Mr. Justice Shiras, at page 468, said that the Constitution did not "extend to and override public rights, *existing* in the form of servitudes or easements, held by the courts of a State to be valid under the constitution and laws of such State." (Italics ours.)

The recognition and enforcement of an *existing* public right of property in navigable waters is due process of law. The *creation* of a public right of property in the "ether", or in appellants' station as an excuse for taking its use away from appellants, is not. When a person acquires property in the bed or waters of a navigable stream, (or in Louisiana, on the bank) he can know from the law that the sovereign has a property right there, which it may exercise whatever the consequence to him. He has fair warning. (*Union Bridge Co.* v. *United States*, 204 U. S. 364; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251.)

Assume that appellants acquired their priority and established their business and made their investment with knowledge that their activities would be subject to regulation. Appellants did not acquire their property subject to the possibility that under the guise of a regulation of interstate commerce, an attempt would be made to prevent the property from being placed to any use whatever.

The right of an established broadcaster was stated in the Interim Report of the Committee on Radio Legislation to the American Bar Association of December 8, 1926, reprinted in the Bar Association's journal of December, 1926, to be such as to entitle him to compensation if refused a license:

> "To close stations in which large sums of money have already been invested is obviously a drastic provision. We do not believe that the courts would hold constitutional legislation which permitted such closing, either directly or indirectly, by way of declining to issue new licenses unless just compensation were paid. * * * The Committee believes that its suggestion (that compensation be paid to any existing station closed by order of the Commission) is sound in law for the following reasons:
>
> "(a) The 1912 statute permitted every one to obtain a license.
>
> "As we have stated above, the Secretary had no discretionary power and he could be mandamused to compel the issuance of a license. The licenses were not for any stated term and could be revoked only for cause. The companies with established business under such a situation had a right to believe that their investments could not be destroyed by the mere repeal of the 1912 law.
>
> "(b) The situation is not analogous to the destruction of property rights involved in the passage of the prohibition laws, because in that case there were very large moral and police questions, and besides the laws were only passed after the Constitution itself had been amended.

"(c) The obligation of the federal government to pay just compensation for closing an existing radio station was recognized in the joint resolution of July 16, 1918, which permitted the President to take over radio stations during the time of war, but only upon payment of just compensation. It is to be noted that even when this power was repealed on July 11, 1919, the compensation provisions were specifically continued.

"(d) The Committee sees no newer constitutional authority for depriving the citizens of property rights under the pending legislation than was included under the 1912 legislation.

"(e) The closing of stations by mere refusal to issue new licenses under the new legislation would be an indirect method of attempting to accomplish a beneficial result that had better be dealt with directly and by specific authority of law.

"(f) The suggestion is entirely in accordance with Chancellor Wilson's decision in the Chicago Tribune case.

"(g) The Secretary or the commission will avoid extended litigation and be able to procure advantageous results more promptly if he or it has the right and the obligation to pay compensation to the stations which are closed.

"(h) The suggestion seems to us eminently fair and must appeal to the general public, to the stations which are closed and to the stations which are permitted to continue to operate, as being reasonable and just."

We submit that the property of appellants cannot be taken in the illegal manner attempted.

III. *This Legislation Deprives Appellants of Their Property Rights Arbitrarily and Unreasonably, and Without Due Process of Law.*

1. *A licensing scheme designed and applied to take private property without compensation, is not due process of law.*

This legislation requires all broadcasters to procure a license. The license is the form; what it does is the substance.

In requiring an occupation license for purposes of taxation, and in forbidding the business unless the tax is paid, as a means of enforcing collection, government can go far. (*United States* v. *Cutting*, 70 U. S. 441.) It can tax occupations that it cannot destroy—or even regulate. (*Davies* v. *City of Hot Springs*, 217 S. W. (Ark.) 769, 771.) But that is not the nature of this case; no license fee is exacted.

Sometimes a license is exacted as a means of registration, as in the case of the Shipping Law, or the Radio Act of 1912. Under the Shipping Law, no one is required to take out a license. (*The Mohawk*, 3 Wall. 566; *St. Clair* v. *United States*, 154 U. S. 134, 151; *Blanchard* v. *The Martha Washington*, 1 Cliff. 463, 3 Fed. Cas. No. 1513.) Under the Radio Act of 1912 every one was entitled to receive a license. (Authorities cited, pp. 7-9.) Obviously, this license under the radio legislation of 1927 and 1928 is to accomplish something more and different. It is not to be issued to every one.

Sometimes a license is a method of permitting the use of property in which the Government has proprietary rights, as in the navigation cases. That is not this case. Appellants used no property but their own. They did not use the listener's radio set

in any other or different sense than a grocer uses the shoes in which a customer walks into his store, or a street car company uses the hands by which a patron pulls himself aboard. The powers of Government to revoke authority to use its property, after fair warning that the revocation may come at any time, are obviously entitled to more latitude than governmental powers to forbid a person to use *his own* property.

Or a license may be required as a method of police regulation, and that is said to be this case. A police regulation must remain within constitutional limitations, whether imposed by one method or another. This license is not merely to *regulate* those engaged in broadcasting; it is designed and intended to *reduce the number* of those engaged in broadcasting. The language of the Act, and the illuminating statements of congressional committees and their members, explaining its intent, leave no doubt of that. (*Vide supra,* pp. 13-17.)

This is defended as necessary, in order that the public might have the benefit of broadcasting. The argument from necessity does not carry far enough, in such a case as this. It is often necessary for the Government to take private property, as when it must tear down a house to build a post-road. It has that power—but only on payment of compensation. Assume that a necessity existed to reduce the number of broadcasters. The Government has that power—on payment of compensation. The real issue here is not the necessity of taking, but the necessity of *uncompensated* taking.

It is said that Government could hardly go on if it had to pay for every interference with the use of private property. But it is also said that when regulation goes far enough, it will be recognized as a taking; the nature of the public interest involved is also regarded, and the

general rule is said to be, that with both the degree of destruction and the nature of the pertinent public interest in view, the line will be pricked out by decisions that approach it from either side. These propositions are summarized in *Pennsylvania Co.* v. *Mahon,* 260 U. S. 393, *supra,* pp. 39-40, and *Tyson & Brother* v. *Banton,* 273 U. S. 418, *supra,* pp. 37-38.

We submit, decisions of this Court hereinbefore referred to have drawn the line so as to leave the radio legislation of 1927 and 1928 far on the side of unconstitutionality. No business and no property is *precisely* like any other business or property. But interests of greater urgency and with a long history of public interference for their vindication, have been repeatedly held not to warrant even a less degree of regulation than the absolute destruction that is attempted here. In view of these cases, the public interest in the broadcasting of entertainment does not create a *necessity* for *uncompensated* taking. In *Tyson & Brother* v. *Banton,* 273 U. S. 418, *supra,* this Court held that the public interest in public theaters did not warrant uncompensated interference to the extent of price-fixing, and it was said at page 445:

> "* * * Constitutional principles, applied as they are written, it must be assumed, operate justly and wisely as a general thing, and they may not be remolded by lawmakers or judges to save exceptional cases of inconvenience, hardship or injustice."

The plea that in order to eliminate interference, or to reduce interference by recently established stations, it was "necessary" to disregard the principle of priority, and destroy a business established as far back as 1925, is condemned by the decision of this Court in *Schlesinger* v. *Wisconsin,* 270 U. S. 230, 240:

> "The presumption and consequent taxation are

> defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an exaction forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B.' Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity * * *."

The fact that the license is to issue on considerations of public interest, convenience, or necessity, will not warrant this extreme destruction for this specious necessity, without just compensation. Confiscation of private property for public convenience, interest or necessity, is precisely what the Fifth Amendment forbids. It is always arbitrary and unreasonable.

But there is another kind of denial of due process in this legislation, independent of the extreme destruction, and the specious nature of the supposed necessity.

Whatever the nature of the public interest, or however slight the interference with the private right, that interference cannot be of the sort which shocks the rudiments of traditional Anglo-Saxon justice and fair dealing; it cannot permit of the play and action of personal and arbitrary power of administration; it cannot seek ends which Government has no power to accomplish. And in each of these particulars, this legislation denies appellants due process of law.

2. *To put appellants entirely out of the business and sacrifice their investment upon their failure to guess correctly every three months what an administrative agency of changing membership means by "public interest, convenience, or necessity" is harshly penal, grossly unfair, and not due process of law.*

The phrase "public interest, convenience, or necessity" is taken from the field of public utility legislation. Before a railroad or a telegraph company can start construction it must obtain a certificate of public convenience and necessity. Language similar to this familiar phrase occurs in some places in this Act. But if the language is reminiscent, the result is wholly unfamiliar. For it is not used to exclude newcomers from a limited field; *this Act would oust those who were established in the field before the law undertook to limit it in order to let others in.* Public utility legislation furnishes no precedent for this.

On the contrary, the whole history of such legislation is precedent against it. For example, the Illinois Act, after defining public utilities,[1] provides:

> "* * * No public utility not owning any city or village franchise *nor engaged in performing any public service or in furnishing any product or commodity within this State* and not possessing a certificate of public convenience and necessity from the State Public Utilities Commission or the Public Utilities Commission, *at the time this Act goes into effect* shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business."[2] (Italics ours.)

The New York law, for another example, similarly rec-

[1] Cahill's Ill. Rev. Stat. (1930) c. 111a, Sec. 2. It does not include broadcasters.

[2] Ibid. Sec. 71.

ognizes the right of those who are already established[1] and so does the Interstate Commerce Law of the United States.[2] This is the legislative policy of the States and the United States, and has been for many years.

At the time of the passage of the Transportation Act of 1920 (Feb. 28, 1920, c. 91, 41 Stat. 474, *et seq.*, 49 U. S. C. A., c. 1.) Congress was confronted with "interference" among railroads. Competition in that limited field was destructive of public interest, some lines were uneconomical, and a reorganization, with merger and realignment of the competing lines was deemed to serve public interest. Obviously, the public interest in the railroad systems of the country is far more urgent than in the broadcasting business, whether history or expediency is regarded. But Congress did not undertake to merge some railroads and eliminate others against their own consent, and without compensation, on the plea of public interest. It passed a statute encouraging voluntary consolidations. (Feb. 28, 1920, c. 91, § 407, 41 Stat. 480, 49 U. S. C. A. c. 1, § 5.)

The similarity of the situations presented to Congress by the railroad situation in 1920, with the government's contention as to the broadcasting situation in 1927, is marked; the difference of solution is striking.

We submit, Congress could not say to a railroad: "You are an uneconomical nuisance, draining a territory so that it has two poor roads where it should have one good one—therefore, stop operating." And if Congress cannot thus confiscate a railroad to vindicate the public inter-

---

[1] Cons. Laws, c. 49, § 9 [Railroad Law]; Cons. Laws, c. 48, §§ 53, 68, 81, 99 [Public Service Commissions Law].

[2] Sec. 1, Par. 18 of the Interstate Commerce Law, added by the Transportation Act of February 28, 1920, 41 Stat. 477; 49 USCA. c. 1, sec. 1, par. (18), represents the extent to which Congress has formerly gone.

est in transportation, even in view of the long history of governmental power over common carriers, then we submit, it cannot thus confiscate a broadcasting station to vindicate the public interest in entertainment, without any such history.

That, evidently, was what Congress at an earlier period understood, for this same legislative policy was applied by Congress in the field of radio. By the Act of August 13, 1912 it is provided:[1]

> "Sec. 4—Eighteenth—No station on shore *not in actual operation on August 13, 1912*, shall be licensed for the transaction of commercial business by radio communication within fifteen nautical miles of the following naval or military stations, * * *" (Italics ours.)

Here is a plain expression of the Congressional policy, apparently recognizing the property right of stations established prior to the effective date of the Act not to be put out of business.

Again, by Joint Resolution of July 16, 1918 (40 Stat. 904) Congress provided:

> "That the President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: *Provided, That just compensation shall be made for such supervision, possession, control, or operation,* to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person

[1] 37 Stat. 304.

> shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code. *Provided further*, That nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

In the 1927 Act and its amendments the established policy is abruptly reversed. Even the licenses granted by Congress, though on their face and by law granted for an unlimited term and revocable only "for cause," are annulled, and this is done without the allegation of any cause, without notice, and without a hearing.

After the Government by an established legislative policy has thus encouraged persons to make large investments, it cannot be squared with the rudiments of fair play as traditionally understood in English speaking communities, to deprive those investments of all value, without compensation, in the name of public entertainment.

Appellants do not desire to fill the sky with discordant noises. (It would not take an Act of Congress to stop that.) They only desire to do exactly what other persons are now permitted to do, and which appellants were doing first.

This Court has said:

> "* * * Recognizing the difficulty in defining, with exactness, the phrase 'due process of law,' it is certain that these words imply a conformity with

natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the State, without compensation * * *." (*Holden* v. *Hardy*, 169 U. S. 366, 390.)

In *Superior Motor Bus Co.* v. *Community Motor Bus Co.*, 320 Ill. 175, a bus line held a certificate of convenience and necessity to operate motor busses from B to M. It was denied permission to extend its line from M to N, but another company was licensed by the administrative agency to operate between B and N, through M. The established line appealed (the Act in that case granted an appeal that would not amount to a waiver of the constitutional right). The Supreme Court of the State said at page 180:

> "The evidence in the case showing that appellant had been meeting all the requirements of the public and of the commission between Belleville and Mascoutah, and that it was ready, able and willing to render efficient service to the public, and it being conceded by all parties that there was not sufficient traffic over this route to justify the operation of two motor bus lines, the action of the commission in granting a certificate of convenience and necessity to appellee was in violation of the rules laid down in the authorities cited and was unreasonable, arbitrary and confiscatory.
>
> "The order of the circuit court confirming the order of the commission is reversed and the order of the commission set aside."

Under this radio legislation, the commission grants no licenses, and renews none, except on its own finding of "public interest, convenience, or necessity." The licenses are only for a three months term, and thus come up for renewal every ninety days upon the same test.

"Public interest, convenience, or necessity," as applied to radio broadcasting, is so indefinite as to be almost meaningless. Under some circumstances it may

be well enough, if it is only applied to those who desire to *enter* the field; their property is not at stake. But when applied to the person whose business and fortune are made to depend on guessing correctly every three months as to what a commission of changing personnel will regard as public interest, convenience, or necessity in this new business, it has a harshly penal operation.

The only appeal under this present Act is to another administrative agency, (*Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464, 74 L. Ed. 514), for whose action the only standard fixed is that it shall "enter such judgment as to it may seem just." (February 23, 1927, c. 169, § 16, 44 Stat. 1169.) This Act does not leave the administrative agencies free to construe "justice" and "public convenience, interest, or necessity" within the bounds of constitutional limitation, even if they should be so inclined; it is a mandatory direction to substitute "equality" for the constitutional tradition of *priority*.[1]

In *Chicago and North Western Ry.* v. *Nye Schneider Fowler Co.*, 260 U. S. 35, this Court said at page 43:

> "The general rule to be gathered from this extended review of the cases is, that common carriers engaged in the public business of transportation may be grouped in a special class to secure the proper discharge of their functions, and to meet their liability for injuries inflicted upon the property of members of the public in their performance; that the seasonable payment of just claims against them for faulty performance of their functions is a part of their duty, and that a reasonable penalty may be imposed on them for failure promptly to consider and pay such claims, in order to discourage delays by them. This penalty or stimulus may be in the form of attorney's fees. But it is also apparent from these cases that such penalties or fees must be moderate and reasonably sufficient to ac-

[1] Feb. 23, 1927, c. 169, § 9, 44 Stat. 1166, as amended Mar. 28, 1928, c. 263, § 5, 45 Stat. 373.

> complish their legitimate object and that the imposition of *penalties or conditions* that are plainly arbitrary and oppressive and 'violate the rudiments of fair play' insisted on in the Fourteenth Amendment, will be held to infringe it." (Italics ours.)

And in this case, commenting with approval on the reason of the former decision of the Court in *Chicago, Milwaukee & St. Paul Ry.* v. *Polt*, 232 U. S. 165, this Court said at page 42:

> "* * * The Court said that the rudiments of fair play required by the Fourteenth Amendment were wanting when a defendant in such a case was compelled to guess rightly what a jury would find or pay double if that tribunal added a cent to the amount tendered, though the tender was futile because of an excessive demand." (*Chicago & North Western Ry. Co.* v. *Nye etc. Co.*, 260 U. S. 35, 42.)

The penalty of paying an attorney's fee is insignificant, compared with the loss of the whole business and investment. And appellants' best efforts will be futile, if the Commission considers that another section of the country is not getting equal radio transmission. If a railroad cannot be compelled, for a breach of duty, to guess what a jury will consider to be reasonable damages, under pain of paying an attorney's fee for a wrong guess, then, we submit, a broadcaster cannot be compelled to guess once every three months what an administrative agency of changing personnel will consider to be public convenience, interest or necessity in this new field, on penalty of paying for a wrong guess with the loss of his business and investment. Such a requirement is shockingly unfair.

In *Hewitt* v. *Board of Medical Examiners*, 148 Cal. 590, 84 Pac. 39, a statute authorized an administrative board to take away a physician's right to practice if he had made "grossly improbable statements" in an advertisement. The Supreme Court of that State held:

> "* * * The right which a person possesses

under the Constitution and the laws, to practise his profession as a physician and surgeon, cannot be made to depend upon a provision of a statute as vague, uncertain, and indefinite as is the provision we have been considering." (84 Pac. 39, 41.)

2. *This radio legislation leaves room for the play and action of arbitrary personal power.*

The license in this case is not one to which appellants can entitle themselves by conforming to objectively defined requirements. Appellants have been operating since in the year of 1925. This legislation would make their right to continue contingent on the opinion of an administrative agency (which it reconsiders every ninety days) that their continued operation will serve "public convenience, interest, or necessity."

What is public convenience, interest, or necessity in radio broadcasting? The Act cannot be said to make it definite in more than two respects: first, that equality, both of reception and transmission is absolutely required; second, that the number of broadcasting stations must be reduced, however property invested in them may be affected. Beyond that, the opinion of the administrators is the only definition of these words.

It is possible to prove how much traffic a territory will produce for a railroad. But the number of people who want to listen to one broadcasting station as compared to another, is guess-work. The proportion and kinds of broadcast material that serves public convenience, interest, or necessity is, within the widest limits, a matter of personal opinion. Private rights cannot be held at the mercy of administrative guess-work and personal opinion.

In *Field* v. *Clark*, 243 U. S. 649, this Court held that power could be given to an administrative body to find

facts and apply them under a binding standard fixed by law. Of course we do not question that doctrine. It justly applies where the citizen knows what he can do to save his property, and has a fair chance to do it. For example, when a railroad appears before the Interstate Commerce Commission on the issue of a reasonable rate, it knows the kind of thing it must prove. Moreover, they are things humanly susceptible of proof. A record can be made which binds the administrator and there is appeal to this court on the constitutional question, if the administrator should fail in duty. The conception of a reasonable rate which the Interstate Commerce Commission administers is not subjective and personal.

But only in the rarest cases can the broadcaster appearing before the Federal Radio Commission actually prove that he does serve public interest, convenience or necessity—however true that may be—so as to bind the administrative agency to recognize his right to receive a license. The pertinent facts are not cost per ton, invested capital, depreciation, and like demonstrable matters. The pertinent facts in this case of the broadcaster are how many people are enjoying the program, how much do they like it, and would they appreciate something else? Except in the rarest cases it is impossible to make proof of the real facts, in respect of those matters, so as to bind the Commission's action. The only thing that the broadcaster can really prove is the kind of broadcasting he has been giving. His whole property then depends on the opinion of the Commission, as to how many people are enjoying such broadcasting and whether they would not prefer something different. A broadcaster who has exerted himself to the utmost and in all good faith, and is ready to comply with every reasonable requirement is thus at the mercy of the Commission, which can say to him: Your three months' li-

cense has expired, and if you think you are serving public interest, convenience or necessity, we do not agree with you. This, we submit, leaves room for the play and action of arbitrary personal power and is condemned by the decisions of this Court.

Before a court would take appellants' station by a judgment, it would apply objective, ascertainable standards, fixed by law. The court's personal ideas of "public convenience, interest, or necessity," or even of "justice," would be carefully laid aside. An objective legal standard would bind the court; appellants would have a constitutional right to hold their property according to its terms. By this legislation administrative agencies would be permitted to take appellants' station upon their own definition of "public convenience, interest, or necessity," or of "justice." Unless administrative agencies are superior to courts in their ability to deal with private rights, then this is an anomaly.

The argument that this kind of discretion is necessary, is to say that public welfare requires personal government; that is not an admissible argument under our Constitution, which establishes the opposite proposition.

"Public convenience, interest, or necessity" and "justice," especially as applied to the new broadcasting field, mean many things to many men. They are not standards of law, but a permission to the administrators to do what is right in their own eyes. The "government of laws, and not of men," required by the decisions of this Court under our Constitution, is not maintained when those already established in the field, with large investments already at stake, hold their property by no more certain tenure than an administrative discretion, whose exercise is unlimited by anything but some vague phrase like "public convenience, interest, or necessity;"

and which is subject to no review except before another administrative body whose discretion is undefined by any word but "justice." Such uncertain phrases permit the administrators to govern according to their own ideas of what they mean. This is not due process of law, but an unconstitutional delegation of arbitrary, personal power.

When this language is used as a further protection of the priority of those who are already established in the field,—and hitherto that has been its use (*Superior Motor Bus Co.* v. *Community Motor Bus Co.* 320 Ill. 175, 180; *People ex rel. New York Central and Hudson River R. R. Co.* v. *Public Service Commission*, 195 N. Y. 157, 166)—then there can be no objection to this additional legislative protection of a property right.

In this present case the Act, by mandatory provision, substitutes "equality" for priority, and requires the established owner to guess what the Commission will consider to be public convenience, interest or necessity, on penalty of being ousted of his property.

It is perfectly clear, we think, that if the Act of 1927 had specifically and in so many words vested in the Commission the arbitrary power of determining who might and who might not broadcast, there would have been an invalid delegation of legislative power under the authority of *United States* v. *Zenith Radio Corporation*, 12 Fed. (2nd) 614, and cases there cited. If the Act fails of condemnation on this ground, it must be because of the purported standard of "public interest, convenience, or necessity" set up in the Act. But merely to set up a standard is not sufficient. If the standard so declared is not adapted to the purpose, or is one which will not in practice effectively prevent the exercise of arbitrary and uncontrolled power by the administrative body, the Act

should still be condemned as an unlawful delegation of legislative power. There have been many cases in which the courts have not hesitated to discard as meaningless and ineffective certain purported standards inserted in administrative laws for the control of the licensing power.

Yick Wo v. *Hopkins*, 118 U. S. 356, involved a legislative agency created by ordinance to grant licenses to conduct the laundry business in wooden buildings. As to this ordinance this Court pointed out at page 368:

> "* * * It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform."

And the ordinance was held unconstitutional, this Court saying at page 369:

> "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

In *Welch* v. *Maryland Casualty Co.* 147 Pac. (Okla.) 1046 a State statute, providing for the admission of foreign insurance companies to do business in the State, provided that a resident agent should be appointed, and gave to the Insurance Commissioner at the time of the application or at any time thereafter "for cause shown, to determine any person so appointed or employed to be unsuitable to act as such agent." The law provided for an appeal of such action of the insurance company to the Supreme Court of the State. The Court said:

> "We are of the opinion that that portion of this section last quoted is in conflict with both the provisions of the Federal Constitution and the Constitution of this state, and therefore void, and to so

hold does not in the least militate against the power of the state to fully regulate the insurance business. It is well settled that the legislature is without power to delegate authority to any person or board to grant or refuse licenses at his or its discretion, arbitrarily or capriciously, according to the state of mind of such officer or persons composing said board. Many authorities and adjudicated cases might be quoted from sustaining this proposition, but, as it has been repeatedly announced, a quotation from a few will suffice." (The Court then quotes from *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Butchers' Union* v. *Crescent City*, 111 U. S. 757; and others).

The Court then proceeded:

"The legislature failed to prescribe any rule controlling the judgment or discretionary power of the insurance commissioner. For reasons satisfactory to himself upon an *ex parte* examination, or without any examination, he could say to one applicant who might be preeminently qualified, 'I find you to be an *unsuitable* person, hence refuse you license', and to another applicant who might failed to have any suitable qualifications, that 'I find you to be a *suitable* person, hence license will be granted.'

"Briefly stated, the power which is sought to be vested in the insurance commissioner is no less than permitting him to issue license to whomsoever he will, and to withhold license arbitrarily from whomsoever he will. If this law is valid, there is really no power to control his action in this regard. It is said, however, that the insurance commissioner is a sworn officer, and we are not to presume that he will act arbitrarily or otherwise than in the exercise of his sound judgment and in good faith; but this is not the question we are called upon to meet. The question is the defect in the law attempting to confer the power. It is so clear to our minds that this part of the statute under consideration is void that further discussion of the question is a useless waste of time. We therefore hold that the portion of the statute quoted is unconstitutional and void."

Vague language of this description is not a constitu-

tional guide to administrative discretion, even when the public interest involved is that of having inflammable and explosive materials that are kept in a city stored in suitable places and in custody of proper persons. In *City of Richmond* v. *Dudley*, 28 N. E. (Ind.) 312, an ordinance provided that licenses for such storage should be required, the license to be issued by the city council on application if it should deem the building "suitable and proper," and the applicant "a proper person," reserving a power of revocation. (The shortness of the term of the license under this radio legislation is exactly equivalent in its effect to a power of revocation.) The Supreme Court of Indiana held this to be unconstitutional, on the principle laid down by this Court in *Yick Wo* v. *Hopkins*, *supra*, and said at pp. 313, 314:

> "The subject covered by the ordinance in question is clearly within the police power conferred by the charter upon the municipality. * * * The danger to be apprehended from the storing of large quantities of inflammable or explosive substances in large quantities within the limits of a city to life and property is so great as to invite legislative control of the same by the city government. The principal question in this case is whether or not the ordinance in question is a valid exercise of that power. It will be observed that this ordinance does not establish any general rule for the storage of substances proposed to be regulated; but reserves to itself, at regular meetings, the right to grant or refuse permission to keep and store such oils, dependent upon whether it at such time deems the location and buildings suitable for such purpose, and the person presenting the petition 'a proper person.' It further provides that the permission, when granted, 'may be revoked at any time, at the option of the council.' Language better calculated to enable the common council *to arbitrarily control the business, without any fixed or known rules*, cannot well be imagined. The business of keeping, storing,

and dealing in such oils is a legitimate business, and every citizen has an inherent right to engage in the business upon equal terms with any other citizen. * * * In *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064, an ordinance of the city of San Francisco, prohibiting the carrying on of laundries without a permit from the board of supervisors, except in buildings constructed of stone, was held invalid. The court say: '*It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform.*' * * * It seems from the foregoing authorities to be well established that municipal ordinances placing restrictions upon lawful conduct or the lawful use of property must, in order to be valid, *specify the rules and conditions to be observed in such conduct or business;* and must admit of the exercise of the privilege of all citizens alike who will comply with such rules and conditions; and must not admit of the exercise, *or of an opportunity for the exercise*, of any arbitrary discrimination by the municipal authorities between citizens who will so comply." (Italics ours.)

In *State ex rel. Markis* v. *Superior Court,* 193 Pac. (Wash.) 845, the ordinance in question provided that the Commissioner of Public Safety might revoke a license to sell candy and soft drinks whenever the "*preservation of public morality, health, peace and good order*" should, in his judgment, render such revocation necessary. The Court said at page 847:

"* * * There is no * * * specifically prescribed cause for revoking the license or specifically prescribed rule of motion which limits or controls the commissioner or the City Council in deciding the question of revoking the license. This means that the commissioner, and in turn the City Council, may according to their own notions of what is a menace to the 'preservation of public morality, health, peace or good order' in each particular case, decide who may and who may not engage in business of this character in the city. In other words, the commissioner is left to determine for himself, not only what

> acts may have been committed by the licensee, but also whether or not such acts are 'disorderly or immoral', or are a menace to the 'preservation of public morality, health, peace or good order' warranting revocation of the license. Manifestly upon appeal to the City Council that body is not, by the terms of the ordinance, controlled by any more specifically prescribed rule of action but, like the commissioner, is a law unto itself in each particular case when the question of revocation of a license comes before that body."

Board of Administration v. *Miles*, 278 Ill. 174, involved an Illinois statute granting to the State Board of Administration power to release or modify the payments from the estate of patients in hospitals for the insane "in any case where the circumstances may justify it." The Court said, page 177:

> "* * * There is nothing in the proviso to indicate under what circumstances the Board of Administration might consider itself justified in releasing or modifying any payment, and no rules are given for the guidance of the Board of Administration in this matter. It is left entirely to the discretion of the board to require or to release payment, uncontrolled by any expression of the legislature as to what principles should govern in determining its action. This is purely arbitrary. It leaves the board to determine at will that one patient shall pay, and that another, under the same circumstances, need not pay or need not pay so much. * * * The purpose of the constitutional provision is to protect every citizen in his personal and property rights against the arbitrary action of any person or authority, *and a statute which subjects any person's rights to the discretion of an officer, without any rules or provisions of law to control the officer, violates such constitutional provision.*" (Italics ours.)

In *State* v. *Fowler*, 114 So. (Fla.) 435, the statute regulated the plumbing trade and provided that the Commissioner should use "the basic principles adopted by the

subcommittee on plumbing, of the Building Code Committee * * * *with such additions as local climatic and other conditions may require.*" This was held an insufficient standard. After quoting authorities the Court said at page 437:

> "The statute in the instant case is too vague and incomplete as a law in itself to become the vehicle for the authorization of the administrative commission to proceed to establish, adopt, promulgate, and put into effect a code governing the installation of plumbing, house drainage, and sewerage disposal. Because of the constitutional infirmities pointed out, the act is invalid and void."

To the same effect, see also:

Bauer v. *City of Chicago*, 321 Ill. 259.
Noel v. *People*, 58 N. E. (Ill.) 616.
Klein v. *Barry*, 196 N. W. (Wis.) 457.
Dockery v. *State*, 247 S. W. (Texas) 508.
Ex parte Faison, 248 S. W. (Texas) 343.
Electric Public Utilities Co. v. *West*, 140 Atl. (Md.) 840.
Sheldon v. *Hoyne*, 261 Ill. 222.
People v. *Klinck Packing Co.*, 108 N. E. (N. Y.) 278.
Winslow v. *Fleischner*, 228 Pac. (Ore.) 101.
In re Peppers, 209 Pac. (Cal.) 896.

The legislature could not have utterly prohibited appellants from going into business on an unappropriated frequency in 1925.

Adams v. *Tanner*, 244 U. S. 590, 594, 595.
Hammer v. *Dagenhart*, 247 U. S. 251.
City of New Orleans v. *New Orleans Butchers Co-op. Abattoir, Inc.* 96 So. (La.) 113, 115, 116.
Monticello v. *Bates*, 183 S. W. (Ky.) 555, 558.

It is plain that the legislature had not undertaken by the Act of 1912, then in force, to prohibit any citizen from going into the business on any unappropriated frequency that he could find. (Authorities cited, pp. 8, 9, *supra.*)

Appellants' right to engage in broadcasting was not given by the 1912 law, nor even by the Constitution. In the language of Chief Justice Marshall in *Gibbons* v. *Ogden,* 9 Wheat. 1, 211:

> "In pursuing this inquiry at the bar, it has been said that the constitution does not confer the right of intercourse between state and state. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true."

The case involved licenses of the Federal Government to engage in the coasting trade. The effect of a license in such a case is stated by Chief Justice Marshall in the same case at page 214:

> "It certainly transfers to him (the licensee) all the right which the grantor can transfer, to do what is within the terms of the license."

Under the law of 1912 appellants held licenses which by law, and on their face, were for an indefinite term, expressly revocable "for cause." (Certificate, 2.)

The 1927 Act purports to take away such right as was granted by the licenses held by appellants under the law of 1912, without notice, hearing or cause. It then purports to give an administrative agency authority, for the sake of such public "convenience, interest or necessity" as may be involved in appellants' business, to take away appellants' inalienable right to engage with their own property in intercourse between the States, destroying their large investment in this field. This is attempted after Congress had encouraged that investment by con-

firming their right, and by transferring to them every right to make that investment that it could transfer.

4. *The requirement of equality bears no reasonable relation to any legitimate purpose which Congress is empowered to accomplish.*

The power of Congress to regulate broadcasting is said to be derived from the power of Congress to regulate interstate and foreign commerce. This power is the power "to prescribe the rule by which commerce is to be governed." (*Gibbons* v. *Ogden*, 9 Wheat. 1.)

In *Hammer* v. *Dagenhart*, 247 U. S. 251, 269, this power is defined as follows:

> "In other words, the power is one to control the means by which commerce is carried on which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities."

In that case it was held that Congress had no power to prohibit products of child labor from moving in interstate commerce. Decisions such as *Champion* v. *Ames*, 188 U. S. 321 (lottery tickets); *Hipolite Egg Co.* v. *United States*, 220 U. S. 45 (pure food); *Hoke* v. *United States*, 227 U. S. 308 (white slave traffic act), and *Clarke Distributing Co.* v. *Western Maryland Ry. Co.* 242 U. S. 341 (intoxicating liquors), were declared to be based "upon the character of the particular subjects dealt with," and it was held with respect to the Federal Child Labor Act (pp. 271, 272):

> "The Act in its effect does not regulate transportation among the States, but aims to standardize the ages in mining and manufacturing within the States."

An attempt was made to sustain the act in that case upon the ground that the states which permitted child labor were given an unfair advantage over the states

which prohibited it. As to this contention this Court said (p. 273):

> "There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition. Many causes may cooperate to give one State, by reason of local laws or conditions an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions."

This Act contains a declaration that the people are entitled to equality. In some things, they are. But not, we submit, equality of commerce; nor of the things which move in commerce. Broadcasting is said to be commerce.

The purpose of this act is not simply to eliminate interference. Appellants interfered with no one; for over a year and a half, they operated continuously with the entire approval of the Federal Radio Commission, on repeated findings of that body that their operation on their frequency served public interest, convenience or necessity. The elimination of interference did not require their destruction. Appellants were destroyed, as the certificate states, "pursuant to the *equalization requirements* of Section 5." (Certificate, 7.) Among these equalization requirements[1] are the following:

> "It is hereby declared that the people of all the zones established by section 82 of this chapter *are entitled to equality* of radio broadcasting service, *both of transmission* and of reception, and in order to provide said *equality* the licensing authority *shall* as nearly as possible make and maintain an *equal* allocation of broadcasting licenses, of bands of frequency or wave lengths, of periods of time for operation, and of station power, *to each of said zones when and in so far as there are applications therefor;* and shall make a fair and equitable allocation of licenses, wave lengths, time for operation, and station power *to each of the States, the District of Co-*

[1] Quoted in the footnote, page 15, *supra*.

lumbia, the Territories and possessions of the United States within each zone, according to population. The licensing authority *shall* carry into effect *the equality* of broadcasting service hereinbefore *directed*, whenever necessary or proper, *by granting or refusing licenses or renewals of licenses*, by changing periods of time for operation, and by increasing or decreasing station power, *when applications are made for licenses or renewals of licenses;* * * *"[1] (Our italics.)

We submit, Congress has no power to forbid benefits to citizens of one section of the country in order that citizens of another section may enjoy them. As in *Hammer* v. *Dagenhart*, *supra*, "the Act in its effect does not regulate commerce." It attempts to equalize broadcasting. Many causes may cooperate in order to give one State, by reason of local laws or conditions, an advantage in radio broadcasting over others. "The commerce clause was not intended to give Congress general authority to equalize such conditions."

We have contended that even if the elimination of interference required the destruction of private property, that created no such necessity as to justify uncompensated destruction.

We have also contended that there is no necessity to destroy private property to eliminate "interference," for the common law rule that priority gives a property right, would enable established broadcasters such as appellants to protect themselves—and thereby the public.

But by no rule of property whatever could the two Texas stations which have now been licensed to use appellants' frequency have got that use at common law. This legislation was "necessary" for one reason only—

[1] Acts of Congress, Feb. 23, 1927, c. 169, sec. 9, 44 Stat. 1166, as amended March 28, 1928, c. 263, sec. 5, 45 Stat. 373.

to take away the property rights of the established broadcasters, in order that their frequencies might be used by other stations in other sections of the country—sections which had not been so prompt in entering the radio field.

If appellants should begin broadcasting tomorrow on their established frequency, their only interference would be with the two Texas stations to which Federal authority has undertaken to give appellants' property.

But for this Act, the very court which enjoined appellants, would have enjoined these later Texas stations from interfering with appellants—for appellants had priority. (Cases cited.) And then the citizens of Texas would have had equality of *reception*. We submit, equality of *reception* is all the listening public has any interest in at all.[1] The elimination of interference will not serve as an excuse for uncompensated destruction of property rights when the provisions of the act are aimed at a result which is not connected with interference.

Interference in *reception* is one thing. It did not exist as to appellants. Equality of transmission is another. Equality of reception serves the listener. Equality of transmission serves the private interest of broadcasters in other sections of the country.

Equality of *reception* has a certain degree of public

[1] If it were desired to increase the power of appellants' broadcasting so even more distant points could hear their programs, then appellants were entitled, by the common decency which is guaranteed to them as due process of law, to have an opportunity to go on with increased power before being forbidden to operate at all. (See, for example, *Superior Motor Bus Co.* v. *Community Motor Bus Co.*, 320 Ill. 175, 180, *supra*, p. 63.) Appellants were using 5,000 watts—and had just installed power for 20,000 watts, on the finding of the Federal Radio Commission that "public convenience, interest or necessity" would be served thereby. (Certificate, 3.)

interest; equality of transmission has the purpose disclosed by the following requirement:

> "Allocations shall be charged to the State, District, Territory, or possession wherein the *studio* of the station is located *and not where the transmitter is located.*" (Title 47 U. S. C. A. ch. 4, sec. 89; our ital.)

C. Is Broadcasting Commerce?

It is our position, and it is not waived, that broadcasting is not commerce. This question is not expressly certified and, therefore, we do not argue it at length. It is a question, however, which we think might well receive the consideration of this Court.

For the purposes of this argument we have assumed that broadcasting is commerce.

D. The Waivers Required by the Joint Resolution of Congress of December 8, 1926 and by the Radio Act of 1927 Are Invalid.

The requirement of these waivers was repugnant to the Fifth Amendment of the Constitution of the United States in so far as they are claimed to prevent the assertion of property rights of a broadcasting station.

The Joint Resolution of Congress of December 8, 1926 provided:

> "* * * no original radio license or the renewal of an existing license shall be granted after the date of the passage of this resolution unless the applicant therefor shall execute in writing a waiver of any right or of any claim to any right, as against the United States, to any wave length or to the use of the ether in radio transmission because of previous license to use the same or because of the use thereof."

It does not appear that such a waiver was filed by the owner of Station WOK. (Certificate 4.)

> "No station license shall be granted by the commission or the Secretary of Commerce until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise." (Radio Act of 1927, § 5.)

Either these waivers are invalid and void or they are to be construed so as not to prevent the assertion of constitutional rights, and particularly rights of property acquired by the establishment of this broadcasting business in 1925, before the Acts requiring these waivers were passed.

If no property right was acquired or if it was a right which Congress could destroy, the requirement of waivers was meaningless and ineffective.

If these waivers are construed merely to prevent assertion of property rights against valid and constitutional regulation then they are likewise ineffective. There is never a right to object to valid and constitutional *regulation.*

But if such waivers are to be construed as preventing broadcasters from asserting their constitutional rights or as waiving the requirement that Congress shall not deprive them of property rights without due process of law nor take their property without just compensation, then the statutory requirement of such waivers as a condition to securing a license is repugnant to the Fifth Amendment.

In *Pullman Company* v. *Kansas,* 216 U. S. 56, a State statute required a foreign corporation to pay a certain proportion of its capital as a charter fee as a condition

of the right to do a local business in the State. This statute was held unconstitutional as imposing a burden on the company's interstate business. This Court approved *Western Union Telegraph Company* v. *Kansas*, 216 U. S. 1, and stated the principle at page 63:

> "* * * that the State could no more exact such a waiver than it could prescribe as a condition of the company's right to do local business in Kansas that it agree to waive the constitutional guaranty of the equal protection of the laws, or the guaranty against being deprived of its property otherwise than by due process of law."

In *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, this Court held a Texas statute unconstitutional which provided that the application of a foreign corporation to do business in the State should contain a stipulation that the permit should become void if the corporation removed a case from a State court into a court of the United States. This Court said, by Mr. Justice Gray, at page 207:

> "But that statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions."

In *Home Insurance Company of New York* v. *Morris*, 87 U. S. 445, there was a State statute similar to that in the Denton case next above, and an agreement of an insurance company in conformity to the statute was held to be as void as the statute itself. Decisions following this case were approved in *Terral* v. *Burke Construction Company*, 257 U. S. 529 and divergent decisions were there overruled.

In *Frost* v. *Railroad Commission*, 271 U. S. 583, this

court held that a private carrier is unconstitutionally deprived of his property without due process of law by a statute requiring him to become a public carrier in order to secure a permit to use the public highways for transportation purposes. The Court said at pp. 592-594:

> "That, consistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt and is not brought into question here. * * * The naked question which we have to determine, therefore, is whether the state may bring about the same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the state altogether to withhold if it sees fit to do so. * * *
>
> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

See also:

Western Union Telegraph Company v. *Frear*, 216 Fed. 199 (Affirmed 241 U. S. 329).

Harrison v. *St. Louis and San Francisco R. R.*, 232 U. S. 318.

Conclusion.

We cannot frame a statement which puts the general nature of this case in a few words more accurately than the language used by this Court in *Pennsylvania Co.* v. *Mahon*, 260 U. S. 393:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by any shorter cut than the constitutional way of paying for the change."

From the foregoing we contend that the first three questions of the court below should be answered in the affirmative, and the remaining three questions in the negative.

Respectfully submitted,

Frank H. Scott,
George W. Swain,
Edward B. Hayes,
Solicitors for Appellants.

APPENDIX

CERTIFICATE.

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Thursday, May 22, 1930.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present: Hon. Samuel Alschuler, Circuit Judge, presiding; Hon. Evan A. Evans, Circuit Judge; Hon. George T. Page, Circuit Judge; Hon. William M. Sparks, Circuit Judge; Henry C. W. Laubenheimer, Marshal; Edward M. Holloway, Clerk.

Before Hon. Samuel Alschuler, Circuit Judge; Hon. Evan A. Evans, Circuit Judge; Hon. George T. Page, Circuit Judge.

4291

AMERICAN BOND AND MORTGAGE COMPANY AND TRIANON, INC.,

vs.

UNITED STATES OF AMERICA

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

STATEMENT OF FACTS

On this appeal certain questions of law have arisen concerning which this Court is in doubt, and desires the instruction of the Supreme Court of the United States. We find, and counsel for the parties agree, that the relevant facts out of which the legal questions grow are:

Appeal was taken to this Court from a decree entered November 5, 1929, by the District Court for the Northern District of Illinois, Eastern Division, perpetually enjoining appellants from the threatened operation of the broadcasting station theretofore, prior to September 1, 1928, operated by them under the call letters WMBB-WOK, until said appellants should obtain a new license issued under and in accordance with the Radio Act of 1927, as amended, authorizing the operation of said station. Subsequent to Septem-

ber 1, 1928 and prior to the institution of this suit, appellants had openly announced their intention to resume operation of their station on the frequency (1190 kcs.) and with the power (5000 watts) which had been formerly used by the station. It is admitted by appellants that operation by this station on this frequency and with this power would have been resumed on Monday, October 22nd, but for the filing of this suit. An injunction pendente lite restraining the operation of the station was made final by the decree from which this appeal is taken. The enjoined station is located at Homewood, Illinois, about 25 miles south of Chi- [fol. 2] cago. The transmitter has a maximum power of 20,000 watts and is of the type used in the operation of a broadcasting station.

On April 3, 1925, the appellant, Trianon, Inc., was licensed by the Secretary of Commerce to operate a radio station of 500 watts power, under the call letters WMBB. On May 5, 1925 this license was succeeded by one issued to American Bond & Mortgage Company to operate said transmitter for a period of three months, using the call letters WMBB, same power. Thereafter licenses were issued up to and including February 23, 1927. Thereafter, during the period from February 23, 1927 to September 28, 1927 licenses were granted by the Federal Radio Commission. From May 25, 1925 to June, 1927 appellant was authorized to use the frequency of 1200 kcs. and thereafter from June, 1927 to September 28, 1927 the frequency of 1190 kcs. with 500 watts power. Appellant shares time on this frequency with station WOK.

On July 27, 1925 the Secretary of Commerce issued a license to a corporation known as Neutrowound Radio Manufacturing Company to operate a 500 watts transmitter at Homewood, Illinois, under the call letters WOK. On November 13, 1925 this license was succeeded by another license issued to operate a new transmitter on the same premises with a power of 5000 watts, using the call letters WOK, which license was renewed until February 23, 1927, and thereafter by the Federal Radio Commission until April 27, 1927.

On the last mentioned date Trianon, Inc. acquired said station from Neutrowound Radio Manufacturing Company for a valuable consideration, together with all legally

assignable rights to the use of call letters WOK. The license to the Neutrowound Manufacturing Company was on its expiration date replaced by a license to the appellant Trianon, Inc. Thereafter the Commission, from time to time issued successive licenses to appellant, Trianon, Inc., to operate said 5000 watts transmitter until September 28, 1927, with a daily division of time with station WMBB. During the period from April 22, 1927 to September 28, 1927 the two stations WMBB and WOK, while they nominally divided time, were to a large extent operated as one station with a continuous broadcasting service, the appellants American Bond & Mortgage Company and Trianon, Inc. being in close financial relation to each other.

[fol. 3] On or about August 3, 1927 the Federal Radio Commission issued a construction permit to the appellant, American Bond & Mortgage Company for the construction of a new transmitter with a maximum power of 20,000 watts, pursuant to a finding by the Commission that public interest, convenience or necessity would be served by the construction of such station. Upon the completion of the construction of the new station the Commission, on or about September 28, 1927 issued a license to appellant, American Bond & Mortgage Company authorizing it to operate said transmitter on full time until October 14, 1927, on a frequency of 1190 kcs. with 5000 watts power, which license was by a later order of the Commission extended to November 1, 1927. On November 1, 1927 pursuant to written application, the Commission granted appellant, American Bond and Mortgage Company a license authorizing it to operate said transmitter for a further period of 60 days on the same frequency and power, and this last mentioned license was extended from time to time, until it finally expired on September 1, 1928, a renewal beyond said last mentioned date having been refused by the Federal Radio Commission as hereinafter set forth.

Pursuant to the Joint Resolution of Congress approved December 8, 1926, appellant, American Bond and Mortgage Company, filed with the Secretary of Commerce on January 24, 1927, in connection with and as part of an application which it was then making for renewal of its license to operate Station WMBB, a signed written waiver of

"any right or any claim of right as against the United States, to any wave length, or to the use of the ether in radio transmission, because of previous license to use the same or because of the use thereof."

The record does not show whether the Neutrowound Radio Manufacturing Company filed a similar written waiver with respect to Station WOK.

In all applications for license or renewal of license filed by either appellants after February 23, 1927 (including the application for renewal of January 13, 1928, hereinafter mentioned, which was denied by the Federal Radio Commission), was contained a written waiver by the applicant

"of any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise."

Each of the licenses and renewal licenses issued by the [fol. 4] Commission to either appellant (including the license which with extensions covered the period from November 1, 1927 to September 1, 1928, and renewal of which was denied by the Commission) contained the following condition:

"This station license shall not vest in the license any right to operate the station nor any right in the use of the frequencies or wave length designated in the license beyond the term thereof nor in any other manner than authorized therein."

On January 13, 1928, appellant duly filed an application for a renewal of the license then held by it (for 5000 watts on 1190 kcs. full time). This license originally covered a period of sixty days, beginning November 1, 1927, but was extended from time to time for short periods of from thirty to sixty days so that it finally expired on September 1, 1928.

On May 25, 1928, the Commission entered its General Order No. 32, which recited that the Commission, after examination of the license applications of the applicants named therein, including appellant, American Bond and

Mortgage Company, was not satisfied "that public interest, convenience or necessity would be served by granting these applications," and fixed the date of July 9, 1928 at ten o'clock A. M., in its offices at Washington, D. C. as the time and place for hearing on each of the applications, which were 164 in number. The Commission mailed a copy of its order to appellant, American Bond and Mortgage Company accompanied by a letter stating, among other things:

"At this hearing unless you can make an affirmative showing that public interest, convenience or necessity will be served by the granting of your application, it will be finally denied."

On July 9, 1928, appellants appeared before the Commission by counsel, as did a large proportion of other stations included in the Order, the hearing on appellants' application being held partly on July 19, 1928 and partly on July 23, 1928. On August 31, 1928 the Commission took action with reference to said appellants' application by rendering the following order:

"The Commission having considered the evidence and the arguments presented to it in the above entitled case, heretofore heard and taken under advisement, and having found that public interest, convenience or necessity would not be served by granting said application,

"It is ordered, that said application be, and the same [fol. 5] is hereby denied; this order to be effective on September 1, 1928, at the hour of 3 o'clock A. M., Eastern Standard Time.

Federal Radio Commission, by Ira E. Robinson, chairman."

Dated August 31, 1928.

Prior to September 1, 1928, appellants had expended on the Homewood transmitter, sums aggregating $100,000.00. The market for the transmitter and incidental equipment is so limited that appellants will be unable to realize from the sale thereof more than a small part of the money invested therein, in fact not more than what would commonly be regarded as its junk value. Appel-

lants have placed certain expensive improvements upon the real estate to house the transmitter; these improvements are designated and particularly adapted for use in connection with the radio broadcasting station and consequently said real estate cannot be sold without a very substantial loss with respect to such improvements. In addition, appellants claim that their radio broadcasting business included a going value and a good will of its radio audience attaching to the call letters WMBB-WOK, to the frequency of 1190 kcs. used in broadcasting their programs, and to the programs themselves. It appears that the programs broadcast by appellants consisted mainly of entertainment (chiefly music) and of talks and addresses on various subjects. During the first eight months of 1928 appellants expended a sum in excess of $23,000.00 for services of employees exclusively for the operation of their station. While there have been occasional instances when appellants have sold time on their programs to advertisers, the revenue from the sale of such time has been of so small an amount as to be practically negligible. Appellants state that:

"Their purpose has at all times been to maintain these stations as a service to the public, and that the only return which they have received or expected to receive, has been from the good will of their patrons and listeners resulting from the high quality of programs which they have broadcast."

Appellant, American Bond and Mortgage Company, is engaged in operating an investment service to a large number of investors in all parts of the United States, both within and without the borders of the State of Illinois, and in selling to such investors bonds, mortgages and other [fol. 6] securities. Appellant, Trianon, Inc., is engaged in the operation for profit of two large public ballrooms in the City of Chicago.

By General Order 40 of the Federal Radio Commission adopted on August 30, 1928, the frequency of 1190 kcs. was designated as a cleared channel (to be used by only one station at a time in evening operation and that to be of substantial power of 5000 watts or more) and was assigned to the Third Zone, as established by Section 2 of the Radio

Act of 1927, and pursuant to the equalization requirements of Section 5 of the Amendatory Act of March 28, 1928. Since November 11, 1928, certain Texas broadcasting stations (WRR and WOAI), which had theretofore operated on other frequencies, have, on a division of time between them, operated exclusively on the frequency of 1190 kcs. with power of 5000 watts each. The operation of appellants' station on this frequency would cause such interference with reception of programs from the Texas stations, and their operation would cause such interference with reception of programs from appellants' station, that the area served with satisfactory reception from either station would be reduced to a small area in the vicinity of each station if they were permitted to operate simultaneously on the same frequency. Appellants state, however,

"that in the event it shall become in the future impossible to broadcast on a frequency of 1190 kcs. in such manner as to satisfactorily transmit their programs to their listeners and patrons, they claim the right to broadcast on such other frequency as will enable them to reach said patrons and listeners, so long as such wave length shall not interfere with interstate commerce or the lawful regulation of the Government for the protection thereof."

There is, however, no frequency in the entire band of 90 frequencies or channels available for use by broadcasting stations in the United States on which appellants' station can be permitted to operate without seriously interfering with reception of programs from some one or more broadcasting stations now in operation under licenses from the Federal Radio Commission and without very substantially reducing the areas served by such stations with satisfactory reception.

Questions Certified.

Question 1. Did a corporation which, prior to the enactment of the Radio Act of 1927, applied for and obtained successive licenses from the Secretary of Commerce authorizing such corporation to broadcast with a specified [fol. 7] transmitter, and which acquired and owned the necessary apparatus, the building in which the apparatus was housed, and the land whereon the same was located,

and continuously broadcasted therewith to an audience interested in its radio programs, have or acquire thereby a property right within the meaning of the word "property" as used in the Fifth Amendment to the Constitution of the United States,

(a) In the continuance of broadcasting by such corporation as a business or occupation?

(b) In the continued use of such apparatus, building and land for similar broadcasting purposes?

Question 2. Does a corporation, which, subsequent to the enactment of the Radio Act of 1927, expended substantial sums in replacing old apparatus with new after obtaining a construction permit from the Federal Radio Commission, and thereafter used the new apparatus under licenses issued by the Federal Radio Commission and continuously broadcast therewith to an audience interested in its radio programs, have or acquire thereby a property right within the meaning of the word "property" as used in the Fifth Amendment to the Constitution of the United States,

(a) In the continuance of such broadcasting as a business or occupation?

(b) In the continued use of such apparatus, building and land for similar broadcasting purposes?

Question 3. If by virtue of the answers to questions 1 and/or 2, it appears that such a corporation had or acquired such property rights, is such a corporation deprived of property without due process of law or without just compensation contrary to the provisions of the Fifth Amendment to the Constitution of the United States by virtue of the waiver required by the joint resolution of Congress of December 8, 1926 or the waiver referred to in the last paragraph of Section 5, or the condition required to be contained in all licenses by sub-paragraph (a) of Section 11, of the Radio Act of 1927, as amended.

Question 4. If by virtue of the answers to questions 1 and/or 2, it appears that after February 23, 1927 such a corporation had or acquired such a property right, is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commis-

sion, in acting upon an application for renewal of license by said person, to deprive such person of such property without due process of law, in that the only standards pro-
[fol. 8] vided by the Act for the guidance of the Commission in acting upon such applications are that of "public interest, convenience or necessity" and that set forth in Section 5 of the Amendatory Act of March 28, 1928, and in that the Act fails to require that the Commission, prior to proceeding to a hearing or decision on such application, shall specify in what respect it deems or has failed to find that the granting of such application would not serve public interest, convenience or necessity, contrary to the provisions of the Fifth Amendment to the Constitution of the United States?

Question 5. If by virtue of the answers to questions 1 and or 2, it appears that after February 23, 1927 such a corporation had or acquired such a property right, is the Act of March 28, 1928 amending the Radio Act of 1927 (commonly known as the Davis Amendment) valid as against the claim that it authorizes or requires the Federal Radio Commission, in acting upon an application for renewal of license to deprive such person of such property without due process of law or to take private property for public use without just compensation, contrary to the provisions of the Fifth Amendment to the Constitution of the United States?

Question 6. If by virtue of the answers to questions 1 and or 2, it appears that after February 23, 1927 such a corporation had or acquired such a property right, is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission in its action on an application for renewal of license by a person such as is described in question 2 to take property for public use without just compensation, by denying such application, contrary to the provisions of the Fifth Amendment to the Constitution of the United States?

The Clerk of this Court is hereby directed to transmit a certified copy hereof to the Supreme Court of the United States.

[fol. 9] Clerk's certificate to foregoing certificate omitted in printing.

Endorsed on cover: File No. 35,132. U. S. Circuit Court of Appeals, Seventh Circuit. Term No. 210. American Bond and Mortgage Company and Trianon, Inc., vs. United States of America. (Certificate.) Filed June 21, 1930. File No. 35,132.

(4693.)

RADIO ACT OF 1927, AS AMENDED.

The relevant sections of the Radio Act of 1927, as amended, with the corresponding section numbers in 47 U. S. C. A., are set out in full in the following pages, and the subject matter of the remaining sections indicated by reference to the title of each.

Section Nos. of 1927 Act.	Corresponding Sections 47 U. S. C. A.	
1	81	*Regulation of interstate and foreign radio communications; grant of license.* This chapter is intended to regulate all forms of interstate and foreign radio transmissions and communications within the United States, its Territories and possessions; to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by individuals, firms, or corporations, for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. That no person, firm, company, or corporation shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia or any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or sig-

Section Nos. of 1927 Act.	Corresponding Sections 47 U. S. C. A.	
		nals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel of the United States; or (f) upon any aircraft or other mobile stations within the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter. (Feb. 23, 1927, c. 169, § 1, 44 Stat. 1162.)
2	82	*Division of United States into Zones.*
3	83	*Creation of commission; composition; qualifications; appointments; meetings; employees; seal; reports; compensation.*
4	84	*Powers and duties of commission.* Except as otherwise provided in this chapter, the commission, from time to time, as public convenience, interest, or necessity requires, shall— (a) Classify radio stations; (b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class; (c) Assign bands of frequencies or wave lengths to the various classes of stations, and assign frequencies or wave lengths for each individual station and determine the power which each station shall use and the time during which it may operate; (d) Determine the location of classes of stations or individual stations; (e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

Section 1927 Act. Correspond- Section 47 U. S. C. A.

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: *Provided, however,* That changes in the wave lengths, authorized power, in the character of emitted signals, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, in the judgment of the commission, such changes will promote public convenience or interest or will serve public necessity or the provisions of this chapter will be more fully complied with;

(g) Have authority to establish areas or zones to be served by any station;

(h) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(i) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(j) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

(k) Have authority to hold hearings, summon witnesses, administer oaths, compel the production of books, documents, and papers and to make such investigations as may be necessary in the performance of its duties. The commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for law books, periodicals, and books of reference, and for printing and binding) as may be necessary for the execution of the functions vested in the commission and, as from time to time may be appropriated for by Con-

Section Nos. of 1927 Act.	Corresponding Sections 47 U. S. C. A.	

gress. All expenditures of the commission shall be allowed and paid upon the presentation of itemized vouchers therefor approved by the chairman. (Feb. 23, 1927, c. 169, § 4, 44 Stat. 1163.)

84a *General counsel and assistants.* (Mar. 4, 1929, c. 701, § 5, 45 Stat. 1559.)

5 85 *Powers and authority of Secretary of Commerce; appeals to commission.*

* * * * * *

"No station license shall be granted by the commission or the Secretary of Commerce until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise. (Feb. 23, 1927, c. 169, § 5, 44 Stat. 1164.)"

6 86 *Government radio stations; regulations; control of all stations by Government in national emergency; stations on vessels.* Radio stations belonging to and operated by the United States shall not be subject to the provisions of sections 81, 84, and 85 of this chapter. All such Government stations shall use such frequencies or wave lengths as shall be assigned to each or to each class by the President. All such stations, except stations on board naval and other Government vessels while at sea or beyond the limits of the continental United States, when transmitting any radio communication or signal other than a communication or signal relating to Government business shall conform to such rules and regulations designed to prevent interference with other radio stations and the rights of others as the licensing authority may prescribe. Upon proclamation by the President

Section Nos. of 1927 Act.	Corresponding Sections 47 U. S. C. A.	
		that there exists war or a threat of war or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States, the President may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations within the jurisdiction of the United States as prescribed by the licensing authority, and may cause the closing of any station for radio communication and the removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such station and/or its apparatus and equipment by any department of the Government under such regulations as he may prescribe, upon just compensation to the owners. Radio stations on board vessels of the United States Shipping Board or the United States Shipping Board Merchant Fleet Corporation or the Inland and Coastwise Waterways Service shall be subject to the provisions of this chapter. (Feb. 23, 1927, c. 169, § 6, 44 Stat. 1165.)
7	87	*Compensation by Government for use or control of stations during national emergency.* The President shall ascertain the just compensation for such use or control and certify the amount ascertained to Congress for appropriation and payment to the person entitled thereto. If the amount so certified is unsatisfactory to the person entitled thereto, such person shall be paid only 75 per centum of the amount and shall be entitled to sue the United States to recover such further sum as added to such payment of 75 per centum which will make such amount as well be just compensation for the use and control. Such suit shall be brought in the manner provided by section 41 (20), or by section 250 of Title 28. (Feb. 23, 1927, c. 169, § 7, 44 Stat. 1165.)

Section Nos. of 1927 Act.	Corresponding Sections 47 U. S. C. A.	
8	88	*Special call letters for stations; application of section* 81 *to foreign ships.*
9	89	*Licenses and renewal of licenses; period.* The licensing authority, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

It is hereby declared that the people of all the zones established by section 82 of this chapter are entitled to equality of radio broadcasting service, both of transmission and of reception, and in order to provide said equality the licensing authority shall as nearly as possible make and maintain an equal allocation of broadcasting licenses, of bands of frequency or wave lengths, of periods of time for operation, and of station power, to each of said zones when and in so far as there are applications therefor; and shall make a fair and equitable allocation of licenses, wave lengths, time for operation, and station power to each of the States, the District of Columbia, the Territories and possessions of the United States within each zone, according to population. The licensing authority shall carry into effect the equality of broadcasting service hereinbefore directed, whenever necessary or proper, by granting or refusing licenses or renewals of licenses, by changing periods of time for operation, and by increasing or decreasing station power, when applications are made for licenses or renewals of licenses: *Provided*, That if and when there is a lack of applications from any zone for the proportionate share of licenses, wave lengths, time of operation, or station power to which such zone is entitled, the licensing authority may issue licenses for the balance of the proportion not applied for from any zone, to applicants from other zones for a temporary period of ninety

Section Nos. of 1927 Act.	Corresponding Sections 47 U. S. C. A.	

days each, and shall specifically designate that said apportionment is only for said temporary period. Allocations shall be charged to the State, District, Territory, or possession wherein the studio of the station is located and not where the transmitter is located.

No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses.

No renewal of an existing station license shall be granted more than thirty days prior to the expiration of the original license. (Feb. 23, 1927, c. 169, § 9, 44 Stat. 1166, as amended Mar. 28, 1928, c. 263, § 5, 45 Stat. 373.)[1]

10	90	*Application for license; conditions and restrictions in license.* The licensing authority may grant station licenses only upon written application therefor addressed to it. All applications shall be filed with the Secretary of Commerce. All such applications shall set forth such facts as the licensing authority by regulation may prescribe as to the citizenship, character, and financial, technical, and other

[1]The third paragraph of this section was amended by § 3 of Act March 28, 1928, c. 263, 45 Stat. 373, and by § 3 of Act Mar. 4, 1929, c. 701, 45 Stat. 1559, providing as follows: "Prior to January 1, 1931, the licensing authority shall grant no license or renewal of license under the Radio Act of 1927 [this chapter] for a broadcasting station for a period to exceed three months and no license or renewal of license for any other class of station for a period to exceed one year."

Section Nos. of 1927 Act.	Corresponding Sections 47 U. S. C. A.	
		qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies or wave lengths and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The licensing authority at any time after the filing of such original application and during the term of any such license may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation. The licensing authority in granting any license for a station intended or used for commercial communications between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 35 of this title. (Feb. 23, 1927, c. 169, § 10, 44 Stat. 1166.)
11	91	*Issuance, renewal or modification of station licenses; hearing; form; terms.* If upon examination of any application for a station license or for the renewal or modification of a station license the licensing authority shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the licensing authority

Section Nos. of 1927 Act. | Corresponding Sections 47 U. S. C. A.

upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

Such station licenses as the licensing authority may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(A) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies or wave length designated in the license beyond the term thereof nor in any other manner than authorized therein.

(B) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this chapter.

(C) Every license issued under this chapter shall be subject in terms to the right of use or control conferred by section 86 hereof.

In cases of emergency arising during the period of one year from and after the first meeting of the commission created hereby, or on applications filed during said time for temporary changes in terms of licenses when the commission is not in session and prompt action is deemed necessary, the Secretary of Commerce shall have authority to exercise the powers and duties of the commission, except as to revocation of licenses, but all such exercise of powers shall be promptly reported to the members of the commission, and any action by the Secretary authorized under this paragraph shall continue in force and have effect only until such time as the commission shall act thereon. (Feb. 23, 1927, c. 169, § 11, 44 Stat. 1167.)

Section Nos. of 1927 Act.	Corresponding Sections 47 U. S. C. A.	
12	92	*Restrictions on grants and transfers of station licenses.* The station license required by section 89 of this chapter shall not be granted to, or after the granting thereof such license shall not be transferred in any manner, either voluntarily or involuntarily, to (a) any alien or the representative of any alien; (b) to any foreign government, or the representative thereof; (c) to any company, corporation, or association organized under the laws of any foreign government; (d) to any company, corporation, or association of which any officer or director is an alien, or of which more than one-fifth of the capital stock may be voted by aliens or their representatives or by a foreign government or representative thereof, or by any company, corporation, or association organized under the laws of a foreign country. The station license required by section 89, the frequencies or wave length or lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner, either voluntarily or involuntarily, disposed of to any person, firm, company, or corporation without the consent in writing of the licensing authority. (Feb. 23, 1927, c. 169, § 12, 44 Stat. 1167.)
13	93	*Refusal of station license to persons guilty of monopoly; liability to prosecution under laws against monopoly.*
14	94	*Revocation of station license; notice of revocation; hearing.* Any station license shall be revocable by the commission for false statements either in the application or in the statement of fact which may be required by section 90 of this chapter, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the licensing authority in refusing to grant a license on an original application, or for failure to operate substantially as set forth

Section Nos. of 1927 Act.	Corresponding Sections 47 U. S. C. A.

in the license, for violation of or failure to observe any of the restrictions and conditions of this chapter, or of any regulation of the licensing authority authorized by this chapter or by a treaty ratified by the United States, or whenever the Interstate Commerce Commission, or any other Federal body in the exercise of authority conferred upon it by law, shall find and shall certify to the commission that any licensee bound so to do, has failed to provide reasonable facilities for the transmission of radio communications, or that any licensee has made any unjust and unreasonable charge, or has been guilty of any discrimination, either as to charge or as to service or has made or prescribed any unjust and unreasonable classification, regulation, or practice with respect to the transmission of radio communications or service: *Provided*, That no such order of revocation shall take effect until thirty days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the parties known by the commission to be interested in such license. Any person in interest aggrieved by said order may make written application to the commission at any time within said thirty days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing herein directed. Notice in writing of said hearing shall be given by the commission to all the parties known to it to be interested in such license twenty days prior to the time of said hearing. Said hearing shall be conducted under such rules and in such manner as the commission may prescribe. Upon the conclusion hereof the commission may affirm, modify, or revoke said orders of revocation. (Feb. 23, 1927, c. 169, § 14, 44 Stat. 1168.)

Section Nos. of 1927 Act.	Corresponding Sections 47 U. S. C. A.	
15	95	*Application of laws against monopolies to radio combinations; revocation of licenses.*
16	96	*Appeals in matters affecting permits and licenses.* Any applicant for a construction permit, for a station license, or for the renewal or modification of an existing station license whose application is refused by the licensing authority shall have the right to appeal from said decision to the Court of Appeals of the District of Columbia; and any licensee whose license is revoked by the commission shall have the right to appeal from such decision of revocation to said Court of Appeals of the District of Columbia or to the district court of the United States in which the apparatus licensed is operated, by filing with said court, within twenty days after the decision complained of is effective, notice in writing of said appeal and of the reasons therefor. The licensing authority from whose decision an appeal is taken shall be notified of said appeal by service upon it, prior to the filing thereof, of a certified copy of said appeal and of the reasons therefor. Within twenty days after the filing of said appeal the licensing authority shall file with the court the originals or certified copies of all papers and evidence presented to it upon the original application for a permit or license or in the hearing upon said order of revocation, and also a like copy of its decision thereon and a full statement in writing of the facts and the grounds for its decision as found and given by it. Within twenty days after the filing of said statement by the licensing authority either party may give notice to the court of his desire to adduce additional evidence. Said notice shall be in the form of a verified petition stating the nature and character of said additional evidence, and the court may thereupon order such evidence to be taken in such manner and upon

Section Nos. of 1927 Act.	Corresponding Sections 47 U. S. C. A.	
		such terms and conditions as it may deem proper. At the earliest convenient time the court shall hear, review, and determine the appeal upon said record and evidence, and may alter or revise the decision appealed from and enter such judgment as to it may seem just. The revision by the court shall be confined to the points set forth in the reasons of appeal. (Feb. 23, 1927, c. 169, § 16, 44 Stat. 1169.)
17	97	*Control by radio interests of cable, wire, telegraph or telephone system; prohibition.*
18	98	*Use of broadcasting stations by legally qualified candidates; censorship.*
19	99	*Broadcasting matter for valuable consideration; announcement of person furnishing.*
20	100	*Operation of transmitting apparatus in radio station; operator's license.*
21	101	*Permits for construction of stations; licenses for operation.* No license shall be issued under the authority of this chapter for the operation of any station the construction of which is begun or is continued after February 23, 1927, unless a permit for its construction has been granted by the licensing authority upon written application therefor. The licensing authority may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the licensing authority by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies and wave length or wave lengths de-

Section Nos. of 1927 Act. | Corresponding Sections 47 U. S. C. A.

sired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the licensing authority may require. Such application shall be signed by the applicant under oath or affirmation.

Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the licensing authority may allow, unless prevented by causes not under the control of the grantee. The rights under any such permit shall not be assigned or otherwise transferred to any person, firm, company, or corporation without the approval of the licensing authority. A permit for construction shall not be required for Government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft. Upon the completion of any station for the construction or continued construction for which a permit has been granted, and upon it being made to appear to the licensing authority that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the licensing authority since the granting of the permit would, in the judgment of the licensing authority, make the operation of such station against the public interest, the licensing authority shall issue a license to the lawful holder of said permit for the operation of said station. Said

Section Nos. of 1927 Act.	Corresponding Sections 47 U. S. C. A.	
		license shall conform generally to the terms of said permit. (Feb. 23, 1927, c. 169, § 21, 44 Stat. 1170.)
22	102	*Stations interfering with distress signals of ships; regulation.*
23	103	*Radio stations on ships; equipment and regulation.*
24	104	*Shore stations and ship stations; exchanging radio communications and signals.*
25	105	*Proximity of Government and private or commercial stations causing interference; regulation.*
26	106	*Limit on amount of power used at stations.*
27	107	*Divulging and publishing radio communications.*
28	108	*False and fraudulent signals of distress and communications; rebroadcasting programs without authority.*
29	109	*Censorship over radio communications and signals; protection of free speech; obscene language.*
30	110	*Use of United States owned radio stations and apparatus by Secretary of Navy for transmission of press messages, etc.*
31	111	*"Radio communication" defined.*
32	112	*Penalties for violation of rules of licensing authority, etc.*
33	113	*Penalties for violation of statutory provisions; perjury.*
34	114	*Jurisdiction of offenses.*

Section Nos. of 1927 Act.	Corresponding Sections 47 U. S. C. A.	
35	115	*Philippine Islands and Canal Zone; application of chapter.*
36	116	*Administration of radio laws in Territories and insular possessions.*
37		Appropriation. (Not now in effect.)
38	117	*Invalidity of part of chapter; effect as to remainder.*
39	118	*Repeal of sections 51 to 63; effect of repeal on existing rights.* Sections 51 to 63, inclusive, of this title in the Code and section 51a of this title in the Supplement are repealed as of February 23, 1927. Such repeal, however, shall not affect any act done or any right accrued or any suit or proceeding had or commenced in any civil cause prior to said repeal, but all liabilities under said laws shall continue and may be enforced in the same manner as if committed; and all penalties, forfeitures, or liabilities incurred prior to taking effect hereof, under any law embraced in, changed, modified, or repealed by this chapter, may be prosecuted and punished in the same manner and with the same effect as if this chapter had not been passed. Nothing in this section shall be construed as authorizing any person now using or operating any apparatus for the transmission of radio energy or radio communications or signals to continue such use except under and in accordance with this chapter and with a license granted in accordance with the authority hereinbefore conferred. (Feb. 23, 1927, c. 169, § 39, 44 Stat. 1174.)
40		Effective date of Act. (Not now in effect.)
41	119	*Citation of chapter as "Radio Act of* 1927".

FILE COPY

Supreme Court, U.S.
FILED
DEC 3 1930
CHARLES ELMORE CROPLEY
CLERK

No. 210

In the Supreme Court of the United States

OCTOBER TERM, 1930

AMERICAN BOND AND MORTGAGE COMPANY AND TRIANON, INC.

v.

UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE APPELLEE BELOW

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Constitutional provision and statutes involved	4
Statement	5
Summary of argument	12
Argument:	
I. Operation of appellants' broadcasting stations and ownership of apparatus, building, and land used for broadcasting purposes, prior to the enactment of the Radio Act of 1927, created no property right to be free from an exercise of the regulatory power of Congress over interstate commerce	15
II. Replacing old apparatus with new pursuant to a construction permit issued under the Radio Act of 1927 and use of the new equipment under licenses issued under that act did not create a property right to disregard the licensing provisions of the act	18
III. Denial of an application for renewal of a broadcasting license, pursuant to the regulatory provisions of the Radio Act of 1927 and of the amendatory act of March 28, 1928, does not take property for the public use or without due process	21
IV. The Radio Act of 1927 is not wanting in due process because of indefiniteness in the statutory standard of public interest, convenience, or necessity or because the act did not require the commission further to define the issues in advance of a hearing before it	30
V. If appellants were deprived of their property without due process or their property was taken for the public use, contrary to the fifth amendment, aside from the waivers signed with respect to operation of appellants' station, the Government does not contend that these waivers imparted validity to an otherwise unconstitutional taking of their property	30
Conclusion	31

25956—30——1

CITATIONS

	Page
Cases:	
Carrell v. *Fed. Radio Comm.*, 36 F. (2d) 117	24
Hamilton v. *Kentucky Distilleries Co.*, 251 U. S. 146	23
Lewis Blue Point Oyster Co. v. *Briggs*, 229 U. S. 82	17
Louisville Bridge Co. v. *United States*, 242 U. S. 409	17
Morris v. *Duby*, 274 U. S. 135	17
New England Divisions Cases, 261 U. S. 184	29
Pipe Line Cases, The, 234 U. S. 548	23
Reinman v. *Little Rock*, 237 U. S. 171	23
Silberschein v. *United States*, 266 U. S. 221	19
Technical Radio Laboratory v. *Fed. Radio Comm.*, 36 F. (2d) 111	24
Tyson & Brother v. *Banton*, 273 U. S. 418	23
Union Bridge Co. v. *United States*, 204 U. S. 364	22
United States v. *Am. Bond & Mortgage Co.*, 31 F. (2d) 448	27
United States v. *Delaware & Hudson Co.*, 213 U. S. 366	17, 23
Wall v. *Parrot Silver & Copper Co.*, 244 U. S. 407	19
White v. *Johnson*, Oct. Term, 1930, No. 29	4, 15, 16, 22, 30
Other citations:	
Congressional Record—	
Vol. 67, Pt. 5, p. 5479	25
Vol. 68, Pt. 3, p. 2575	25
House Report No. 800, Seventieth Congress, first session	26
Report of Fifty-second Annual Meeting American Bar Association	27
Annual Report, Federal Radio Commission, for fiscal year ended June 30, 1928	27, 28

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 210

AMERICAN BOND AND MORTGAGE COMPANY AND Trianon, Inc.

v.

UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE APPELLEE BELOW

OPINION BELOW

The opinion of the United States District Court for the Northern District of Illinois is reported in 31 F. (2d) 448.

JURISDICTION

The case is here on certificate under Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The Circuit Court of Appeals certified the following questions:

1. Did a corporation which, prior to the enactment of the Radio Act of 1927, applied

for and obtained successive licenses from the Secretary of Commerce authorizing such corporation to broadcast with a specified transmitter, and which acquired and owned the necessary apparatus, the building in which the apparatus was housed, and the land whereon the same was located, and continuously broadcasted therewith to an audience interested in its radio programs, have or acquire thereby a property right within the meaning of the word "property" as used in the Fifth Amendment to the Constitution of the United States,

(a) In the continuance of broadcasting by such corporation as a business or occupation?

(b) In the continued use of such apparatus, building and land for similar broadcasting purposes?

2. Does a corporation, which, subsequent to the enactment of the Radio Act of 1927, expended substantial sums in replacing old apparatus with new after obtaining a construction permit from the Federal Radio Commission, and thereafter used the new apparatus under licenses issued by the Federal Radio Commission and continuously broadcast therewith to an audience interested in its radio programs, have or acquire thereby a property right within the meaning of the word "property" as used in the Fifth Amendment to the Constitution of the United States,

(a) In the continuance of such broadcasting as a business or occupation?

(b) In the continued use of such apparatus, building and land for similar broadcasting purposes?

If by virtue of the answers to questions 1 and/or 2, it appears that such a corporation had or acquired such a property right, the Circuit Court of Appeals asked:

3. Is such a corporation deprived of property without due process of law or without just compensation contrary to the provisions of the Fifth Amendment to the Constitution of the United States by virtue of the waiver required by the joint resolution of Congress of December 8, 1926, or the waiver referred to in the last paragraph of Section 5, or the condition required to be contained in all licenses by subparagraph (a) of Section 11 of the Radio Act of 1927 as amended?

4. Is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission, in acting upon an application for renewal of license by said person, to deprive such person of such property without due process of law, in that the only standards provided by the Act for the guidance of the Commission in acting upon such applications are that of "public interest, convenience or necessity" and that set forth in Section 5 of the Amendatory Act of March 28, 1928, and in that the Act fails to require that the Commission, prior to proceeding to a hearing or decision on such application, shall specify in what respect it deems or has failed to find that the

granting of such application would not serve public interest, convenience or necessity, contrary to the provisions of the Fifth Amendment to the Constitution of the United States?

5. Is the Act of March 28, 1928, amending the Radio Act of 1927 (commonly known as the Davis Amendment) valid as against the claim that it authorizes or requires the Federal Radio Commission, in acting upon an application for renewal of license, to deprive such person of such property without due process of law or to take private property for public use without just compensation, contrary to the provisions of the Fifth Amendment to the Constitution of the United States?

6. Is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission in its action on an application for renewal of license by a person such as is described in question 2 to take property for public use without just compensation, by denying such application, contrary to the provisions of the Fifth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The relevant portion of the Constitution and of the statutes are set forth in the Government's brief in *White* v. *Johnson,* No. 29, on the current docket of this Court, pp. 53–65.

STATEMENT

The certificate of the Circuit Court of Appeals states the facts substantially as follows:

American Bond and Mortgage Company operates an investment service and sells to investors in all parts of the United States bonds, mortgages, and other securities. (P. 6.) Trianon, Inc., operates two large public ballrooms in the City of Chicago, Illinois. (P. 6.) These two corporations (hereinafter sometimes called appellants) are in close financial relation to each other. (P. 3.)

On August 31, 1928, the Federal Radio Commission denied an application for renewal of the license under which the American Bond and Mortgage Company had been operating a radio broadcasting station located at Homewood, Illinois, about twenty-five miles from the City of Chicago. (Pp. 2, 5.) After appellants had announced that they intended to resume operation of this station on a frequency of 1,190 kcs. and with a power of 5,000 watts, the United States brought this action to enjoin such operation. (P. 2.) Appellants appealed from a decree of the United States District Court for the Northern District of Illinois which perpetually enjoined them from operating their station until they should obtain a license issued under the Radio Act of 1927, c. 169, 44 Stat. 1162, authorizing such operation. (P. 1.)

The certificate (pp. 2–5) sets forth the history of the station and the proceedings leading up to the Commission's refusal to renew a license therefor. On April 3, 1925, Trianon, Inc., was licensed by the Secretary of Commerce under the Act to Regulate Radio Communication of August 13, 1912, c. 287, 37 Stat. 302, to operate a radio station of 500 watts power under the call letters WMBB. This license was succeeded on May 5, 1925, by a three months' license entitling the American Bond and Mortgage Company to operate the station with the same power. Thereafter and until February 23, 1927, the date of the enactment of the Radio Act of 1927, successive licenses were issued by the Secretary of Commerce to the American Bond and Mortgage Company, and from that time to September 28, 1927, successive licenses were granted it by the Federal Radio Commission. From May 25, 1925, to June, 1927, these licenses authorized use of the frequency of 1,200 kcs. and thereafter to September 28, 1927, use of the frequency of 1,190 kcs.

In July, 1925, a corporation known as Neutrowound Radio Manufacturing Company obtained from the Secretary of Commerce a license to operate a broadcasting station located at Homewood, Illinois, with a power of 500 watts, under the call letters WOK. This license was succeeded in November, 1925, by one permitting the use of a new transmitter with a power of 5,000 watts. The

latter license was renewed by the Secretary of Commerce until February 23, 1927, and thereafter by the Federal Radio Commission until April 27, 1927. On the latter date Trianon, Inc., acquired the station for a valuable consideration, and the Federal Radio Commission issued to Trianon, Inc., successive licenses to operate the 5,000 watts transmitter until September 28, 1927, with a daily division of time with station WMBB. During the period from April, 1927, to September 28, 1927, the two stations, WMBB and WOK, while they nominally divided time, were to a large extent operated as one station with a continuous broadcasting service.

On August 3, 1927, the Federal Radio Commission issued, pursuant to its finding that public interest, convenience, or necessity would be served thereby, a construction permit to the American Bond and Mortgage Company for the construction of a new transmitter at Homewood. Upon the completion of the construction of the new station the Commission, on Sepember 28, 1927, issued a license to American Bond and Mortgage Company authorizing full-time operation of the station on a frequency of 1,190 kcs. with 5,000 watts power. Upon the expiration of the license the Commission granted a second license, which authorized operation on the same frequency and power for 60 days from November 1, 1927. The latter license was extended from time to time until it finally expired on September 1, 1928.

25956—30——2

In January, 1928, American Bond and Mortgage Company filed an application for a renewal of its license. In May, 1928, the Commission entered General Order 32, which recited that the Commission had examined the license applications of the applicants named therein, including American Bond and Mortgage Company, and that it was not satisfied that public interest, convenience, or necessity would be served by granting these applications, and fixed July 9, 1928, in its offices at Washington, D. C., as the time and place for hearing on each of the applications, 164 in number. The Commission mailed a copy of its order to American Bond and Mortgage Company accompanied by a letter stating, among other things:

> At this hearing unless you can make an affirmative showing that public interest, convenience, or necessity will be served by the granting of your application, it will be finally denied.

On July 9, 1928, appellants appeared before the Commission by counsel, as did a large proportion of the other stations included in the order. The hearing on appellants' application was held partly on July 19, 1928, and partly on July 23, 1928. On August 31, 1928, the Commission took action with reference to appellants' application by rendering the following order:

> The Commission having considered the evidence and the arguments presented to it in the above-entitled case, heretofore heard

> and taken under advisement, and having found that public interest, convenience or necessity would not be served by granting said application,
>
> It is ordered, that said application be, and the same is hereby denied; this order to be effective on September 1, 1928, at the hour of 3 o'clock A. M., Eastern Standard Time.

By General Order 40 of the Federal Radio Commission, adopted August 30, 1928, the frequency of 1,190 kcs. was designated as a cleared channel to be used only by stations having at least 5,000 watts power and by only one station at a time in evening operation. Pursuant to the equalization requirements of Section 5 of the Amendatory Act of March 28, 1928, c. 263, 45 Stat. 373, this channel was assigned by said order to the Third Zone, as established by Section 2 of the Radio Act of 1927. Since November 11, 1928, two Texas broadcasting stations, WRR and WOAI, which had previously operated on other frequencies, have, on a division of time between them, operated exclusively on a frequency of 1,190 kcs. with power of 5,000 watts each. If appellants' station were permitted to operate simultaneously on the frequency used by the Texas stations, only a small area in the vicinity of each station would obtain satisfactory reception of the programs of either the Texas stations or appellants' station. There is no frequency available for United States broadcasting stations on which appellants' station can operate without seriously interfering

with reception of programs from some one or more broadcasting stations now in operation under licenses from the Federal Radio Commission and without very substantially reducing the areas served by such stations with satisfactory reception. (Pp. 6–7.)

Prior to September 1, 1928, appellants had expended on the Homewood transmitter sums aggregating $100,000. The transmitter has a maximum power of 20,000 watts and is of the type used in the operation of a broadcasting station. The market for the transmitter and incidental equipment is so limited that appellants will be unable to realize from its sale more than what would commonly be regarded as its junk value. Appellants have placed certain expensive improvements upon the real estate to house the transmitter; these improvements are particularly adapted for use in connection with the broadcasting station and consequently the real estate can not be sold without a very substantial loss with respect to such improvements. In addition, appellants claim that their broadcasting business included a going value and a good will of its radio audience attaching to the call letters WMBB-WOK, to the frequency of 1,190 kcs. used in broadcasting their programs, and to the programs themselves. It appears that the programs broadcast by appellants consisted mainly of entertainment, chiefly music, and of talks and addresses on various subjects. During the first eight months of 1928 appellants expended a sum in excess of

$23,000 for services of employees exclusively for the operation of their station. While there have been occasional instances when appellants have sold time on their programs to advertisers, the revenue from the sale of such time has been of so small an amount as to be practically negligible. (Pp. 2, 5–6.) Appellants state that—

> Their purpose has at all times been to maintain these stations as a service to the public, and that the only return which they have received or expected to receive, has been from the good will of their patrons and listeners resulting from the high quality of programs which they have broadcast. (P. 6.)

Pursuant to the Joint Resolution of Congress approved December 8, 1926, c. 1, 44 Stat. 917, the American Bond and Mortgage Company filed with the Secretary of Commerce on January 24, 1927, as a part of an application which it was then making for renewal of its license to operate Station WMBB, a signed written waiver of—

> any right or any claim of right as against the United States, to any wave length, or to the use of the ether in radio transmission, because of previous license to use the same or because of the use thereof. (P. 4.)

All applications for license or renewal of license filed by either appellant after February 23, 1927, contained a written waiver by the applicant—

> of any claim to the use of any particular frequency or wave length or of the ether as

> against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise. (P. 4.)

Each license and renewal license issued by the Commission to either appellant contained the following condition:

> This station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies or wave length designated in the license beyond the term thereof nor in any other manner than authorized therein. (P. 4.)

SUMMARY OF ARGUMENT.

I. The operation of appellants' broadcasting stations and appellants' ownership of apparatus used for broadcasting, prior to the enactment of the Radio Act of 1927, created no property right to be free from an exercise of the regulatory power of Congress over interstate commerce. Before Congress had undertaken by that Act to regulate broadcasting, such operation and the use of such property were subject to the control over interstate commerce vested in Congress by the Constitution and could not give rise to a property right free of such control. The doctrine of prior appropriation upon which the alleged property right is grounded is limited to a determination of superior right between private claimants and does not confer a prescriptive right against a proper exercise

of governmental power. The doctrine, moreover, is not applicable to radio broadcasting.

Apart from these considerations, the right to broadcast with a station using 5,000-watts power, which appellants assert, was not acquired by them prior to the enactment of the Radio Act of 1927, and appellants have no apparatus which they used for broadcasting prior to such enactment.

II. Replacing old apparatus with new pursuant to a construction permit issued under the Radio Act of 1927 and use of the new equipment under licenses issued under that Act did not create a property right to disregard its licensing provisions. The Act is explicit that the granting of a construction permit or operating license creates no such right. The alleged right can not arise if these provisions are constitutional, but appellants are in no position to assert that the Act is unconstitutional. They can not base a property right on authorizations obtained under the Act and at the same time attack its constitutionality.

III. Any loss to appellants caused by the Federal Radio Commission's refusal, pursuant to the regulatory provisions of the Radio Act of 1927, to renew the license for their station was an injury incidentally resulting from a legitimate exercise of governmental power and was not a taking of property for the public use. Power in the Commission to establish cleared channels pursuant to the equalization requirements of Section 9 of the Radio Act

of 1927 and Section 5 of the Amendatory Act of March 28, 1928, and for this purpose to deny to a station a renewal of its license is reasonably necessary and appropriate to regulation of broadcasting in the public interest.

The provisions of Section 9 of the Act, as amended by the Act of March 28, 1928, are not so arbitrary and unreasonable as to amount to want of due process. This section authorizes the Commission, in granting or refusing licenses for broadcasting, to allocate frequencies and power to the five zones into which the United States is divided by the Act so as to give to each zone equal broadcasting service. Equality of service is a fundamental principle of public utility regulation and it is reasonable to extend this principle to broadcasting. Equality in broadcasting service requires an approximately equal distribution of broadcasting stations throughout the different sections of the country. There was therefore no want of due process when the Commission determined that a frequency previously used by a high-powered station outside of the third zone should be assigned to stations in that zone and when it selected the frequency of appellants' station for such assignment.

IV. The Radio Act of 1927 is not wanting in due process because of indefiniteness in the statutory standard of public interest, convenience, or necessity or because the Act did not require the Commission further to define the issues in advance of a

hearing before it. This question is precisely the same as one of the questions presented in *White* v. *Johnson*, No. 29 on the current docket of this Court, and reference is made to the argument on this point in the Government's brief filed with the Court in *White* v. *Johnson*.

ARGUMENT

I

OPERATION OF APPELLANTS' BROADCASTING STATIONS AND OWNERSHIP OF APPARATUS, BUILDING, AND LAND USED FOR BROADCASTING PURPOSES, PRIOR TO THE ENACTMENT OF THE RADIO ACT OF 1927, CREATED NO PROPERTY RIGHT TO BE FREE FROM AN EXERCISE OF THE REGULATORY POWER OF CONGRESS OVER INTERSTATE COMMERCE

The first question certified by the Circuit Court of Appeals is whether the operation of a broadcasting station and the acquisition of apparatus, building, and land for broadcasting purposes, prior to the enactment of the Radio Act of 1927, creates a property right within the meaning of the word "property" as used in the Fifth Amendment (a) to continue broadcasting or (b) to continue the use of such apparatus, building, and land for broadcasting purposes.

We submit that this question, so far as it relates to the existence of a right to continue broadcasting arising out of broadcasting operations before the passage of the Radio Act of 1927, is answered in the Government's brief filed with this Court in

White v. *Johnson,* No. 29, on the current docket of the Court. The argument there advanced was: (1) The operation of a broadcasting station is at all times subject to the regulatory power of Congress over interstate commerce and therefore operation of such a station prior to the enactment of the Radio Act of 1927 does not create a property right to be thereafter free from an exercise of such regulatory power. (Gov. brief in No. 29, pp. 13–21.) (2) The doctrine of prior appropriation upon which the alleged property right is based is limited to a determination of superior right between private claimants and does not confer a prescriptive right against a proper exercise of governmental power. (*Ibid,* pp. 21–24.) (3) The doctrine of prior appropriation is not applicable to radio broadcasting. (*Ibid,* pp. 24–29.)

Apart from these objections to a property right based on operation of broadcasting stations before Congress undertook any comprehensive regulation of radio communication, we submit that the facts in this case do not support the right which appellants assert. This suit was brought to enjoin appellants from carrying out their announced intention to broadcast with 5,000 watts power. (*Supra,* p. 5.) A right to broadcast with this power can not be based on the operations of station WMBB, which never used more than 500 watts power. Station WOK, on the other hand, was not owned by appellants prior to the enactment of the Radio Act of 1927 on February 23, 1927. (*Supra,* pp. 6–7.)

The good will of patrons and listeners, for which appellants have operated and desire to operate their station (*supra,* p. 11) had not attached at this date. Since appellants' business of broadcasting with a station using 5,000 watts power began after the enactment of the Radio Act of 1927, the facts do not establish the necessary premise for applying the alleged rule (Appellants' brief, pp. 25–28) that the right to continue an established business is property.

We submit that the other part of the question certified, whether a prior use of apparatus and land for broadcasting purposes creates a property right to continue such use, is merely stating the issue in another way. Probably every business requires the use of property. If one can not, by engaging in interstate commerce before Congress has acted, obtain immunity from future Congressional regulation, surely such a right can not be obtained by attaching to the property used in interstate commerce a right to be continued in the same use free from such regulation. Land under navigable water used for many years for the production of oysters does not have attached to it a right to be continued in such use when this would interfere with an improvement in navigation. See *Lewis Blue Point Oyster Co.* v. *Briggs,* 229 U. S. 82. See also *Louisville Bridge Co.* v. *United States,* 242 U. S. 409; *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366; *Morris* v. *Duby,* 274 U. S. 135.

Any property right in this case based on the prior use of certain apparatus is subject to the further difficulty that, if it could be said to exist, it must be limited to the life of the particular equipment used. But station WMBB has been abandoned and the equipment which station WOK used when the Radio Act of 1927 was adopted has been replaced. (*Supra*, p. 7.) The facts, therefore, do not support a right based on the continued use of apparatus which was employed for broadcasting purposes prior to the enactment of the Radio Act of 1927.

II

REPLACING OLD APPARATUS WITH NEW PURSUANT TO A CONSTRUCTION PERMIT ISSUED UNDER THE RADIO ACT OF 1927 AND USE OF THE NEW EQUIPMENT UNDER LICENSES ISSUED UNDER THAT ACT DID NOT CREATE A PROPERTY RIGHT TO DISREGARD THE LICENSING PROVISIONS OF THE ACT

The second question certified asks whether the installation of new apparatus after the enactment of the Radio Act of 1927, pursuant to a permit obtained from the Federal Radio Commission, and the use of this apparatus under operating licenses from the Commission gave rise to a property right to continue broadcasting. Since the Act is explicit that the granting of a construction permit or operating license creates no such right, it seems to follow that the right could arise only if the licensing requirements of the Act are inherently unconstitutional even when applied to those who had not previously engaged in broadcasting.

Appellants' brief does not seem to contend that the licensing requirements of the Act are inherently unconstitutional. Their brief faintly suggests (p. 33) that it was arbitrary for the Commission to grant a construction permit, on the faith of which they invested in new apparatus, and to deny a year later renewal of their operating license. This result was a risk which, under the express terms of the Act, appellants assumed. Obviously regulation would be impossible if the Commission exhausted its power when it first granted a construction permit or issued an operating license. If new conditions arise, new facts are discovered, or a modification in the legislative policy is adopted, public interest, convenience, or necessity may require a different conclusion than the one reached earlier in acting upon a prior application for a license or construction permit. Even upon the same state of facts an executive officer may on reconsideration alter his previous decision. *Silberschein* v. *United States*, 266 U. S. 221, 224. In any event, appellants can not base their asserted property right on the authorizations obtained under the Radio Act of 1927 and at the same time attack its constitutionality. *Wall* v. *Parrot Silver & Copper Co.*, 244 U. S. 407, 411–412.

The Act, as previously stated, negatives the creation of any right to continue broadcasting because of the prior granting of a construction permit or operating license. The granting of a construction permit gives no right even to an initial operating

license for the station so constructed. Section 21 of the Act (Gov. brief in No. 29, p. 60) provides that no operating license shall be issued for any station constructed after the Act takes effect unless the Federal Radio Commission has granted a permit for its construction. The section further provides that when a station for which a construction permit has been granted is completed, an operating license shall be issued, but only if nothing arising or coming to the Commissioner's knowledge after the construction permit was granted would, in its judgment, make the operation of the station against the public interest.

The Radio Act of 1927 also expressly provides that the granting of an operating license gives no right to operate beyond the terms of the license granted. Subparagraph (A) of Section 11 provides:

> (A) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies or wave length designated in the license beyond the term thereof nor in any other manner than authorized therein.

The last paragraph of Section 5 provides:

> No station license shall be granted by the commission or the Secretary of Commerce until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

The American Bond and Mortgage Company filed the waivers required by Section 5 and each license issued to it by the Commission included as a condition the provisions of Section 11, subparagraph (A). (*Supra*, pp. 11–12.)

III

DENIAL OF AN APPLICATION FOR RENEWAL OF A BROADCASTING LICENSE, PURSUANT TO THE REGULATORY PROVISIONS OF THE RADIO ACT OF 1927 AND OF THE AMENDATORY ACT OF MARCH 28, 1928, DOES NOT TAKE PROPERTY FOR THE PUBLIC USE OR WITHOUT DUE PROCESS

The sixth question certified presents the issue whether, on the assumption that appellants had a property right to continue broadcasting, the denial of an application for renewal of a broadcasting license, as authorized or required by the Radio Act of 1927, as amended, took their property for the public use, contrary to the Fifth Amendment. The fifth question certified presents the issue whether, on the same assumption as to a property right, the amendatory act of March 28, 1928 (known as the Davis Amendment), took their property for the public use or deprived them of property without due process, contrary to the Fifth Amendment.

We submit that the limited channels available for broadcasting, the excessive number of broadcasting stations operating when the Radio Act of 1927 was adopted, and the extremely complicated problems involved in allocating available broadcasting channels so as to utilize them as fully as

possible and so as to furnish all parts of the country and all communities with fair and efficient broadcasting service made it essential to confer upon the regulatory body created by Congress authority to deny an application for renewal of a broadcasting license. The provisions of the Radio Act of 1927 conferring such authority on the Federal Radio Commission are therefore reasonably adapted to regulation in the public interest of interstate broadcasting. An injury incidentally resulting from such a legitimate exercise of governmental power is not a taking of property for the public use or a taking without due process. We respectfully refer to the argument on this point in the Government's brief (pp. 31–46) filed with this Court in *White* v. *Johnson, supra.*

The American Bond and Mortgage Company did not exercise its statutory right of appeal from the order of the Commission denying its application for a renewal of its broadcasting license and the Commission's determination that the public interest, convenience, or necessity would not be served by granting the license is conclusive. Appellants in effect assert a constitutional right to obstruct interstate commerce. But this Court has held that an obstruction to interstate commerce, even though originally entirely lawful, can be removed not only without payment of compensation but at the expense of the owner. *Union Bridge Co.* v. *United States,* 204 U. S. 364, 399–400. Moreover, the

powers of Congress are no more restricted by the Fifth Amendment than are the police powers of the States by the Fourteenth Amendment (*Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156–157), and this Court has held that an ordinance may require a business lawfully carried on for many years at certain premises to move to an entirely different locality and to abandon its specially constructed buildings when growth of the city makes continuance of the business in the same location objectionable. *Reinman* v. *Little Rock*, 237 U. S. 171. Under the commerce clause a railroad may be required without compensation to abandon a business lawfully carried on for many years, namely, the transportation in interstate commerce of any article owned by it or by a company controlled by it. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366. Acting under the commerce clause Congress may require an interstate pipe line which had previously transported only its own oil to give up its business or become a common carrier of oil. *The Pipe Line Cases*, 234 U. S. 548, 559–561.

Since the Radio Act of 1927 rests on the commerce clause and not on the police power, appellants' contention that broadcasting is essentially entertainment and that entertainment is not a business affected with a public interest (*Tyson & Brother* v. *Banton*, 273 U. S. 418) is irrelevant.

The Court of Appeals of the District of Columbia has sustained, against an attack under the Fifth Amendment, an order of the Commission refusing to renew the license of a broadcasting station which had been in operation since before the enactment of the Radio Act of 1927. *Technical Radio Laboratory* v. *Federal Radio Commission*, 36 F. (2d) 111, 113. Similar orders of the Commission were upheld by that court in *Carrell* v. *Federal Radio Commission*, 36 F. (2d) 117.

Appellants' principal contention seems to be that the provisions of Section 9 of the Radio Act of 1927, as amended by Section 5 of the Act of March 28, 1928, are so arbitrary and unreasonable as to amount to want of due process. This section, as amended, authorizes the Commission in granting or refusing licenses to bring about, whenever necessary or proper, equality of broadcasting service among the different zones established by Section 2 of the Act. Appellants do not contend that the particular geographical sections created by the zones are unreasonable; the attack is on the statutory provision that substantial equality of radio service throughout the United States should be a consideration in granting or refusing licenses.

The debates in Congress on the bill which became the Radio Act of 1927 show that prior to the passage of that Act broadcasting stations were very unequally distributed in different sections of the country and that they were unduly concentrated

about certain cities. When this bill was first presented to the House, Congressman White said (Cong. Rec., Vol. 67, pt. 5, p. 5479):

> Existing law gives the Secretary no control over the location of stations. The result has been an unjustifiable grouping of stations within limited areas. There are within 50 miles of Chicago 40 stations, of New York 38, of Philadelphia 22, and of San Francisco 22. Stations so centered detract from the value of each other and interfere with the highest quality of service.

When the conference report on the bill was presented to the House, Congressman Davis said (Cong. Rec., Vol. 68, pt. 3, p. 2575):

> There are now about 700 broadcasting licenses, as has been stated. About 600 of those are held in 21 States, chiefly in a few large cities. Seventy of these are in one State. * * *
>
> * * * Now to give you some conception—and this is not a sectional matter—I am insisting that there should be no discrimination against or in favor of any section, but when I figured them up not long ago, in the entire South and Southwest, constituting one-third of the geographical area and of the population of this country, there were 79 broadcasting stations, and there was not one first-class license in the whole lot, and is not to-day, south of the Ohio River.

The report of the House Merchant Marine and Fisheries Committee on the bill which became the

Act of March 28, 1928, shows that the broadcasting service of the third zone, based on the licensed stations located in that zone, was far inferior to that to which its relative population and area would entitle it. The report said (H. Rep. No. 800, 70th Cong., 1st Sess., p. 3):

> This third zone has a greater percentage of the population of the United States than either of the other zones and is second in area. It has, however, the smallest number of stations, with less power authorized to be used by them than any of the other zones.

The report (p. 3) contained a table which was said to represent the existing situation with substantial correctness. This table shows that whereas the population of each of the first four zones was between 24,000,000 and 25,000,000, the respective percentages of station power were as follows:

Zone 1	35.30
Zone 2	19.34
Zone 3	7.80
Zone 4	27.31

Equality of service is a fundamental principle of public utility regulation. Equality of service in broadcasting depends in large part upon a proper geographic distribution of operating stations. Such distribution is necessary to give equal reception to different parts of the country. Under average conditions during evening hours a station of 5,000 watts power has a radius of area of good service for the suburban dweller of approximately only 100 miles and a radius of area of fair service

for rural listeners of approximately only 1,000 miles.[1] We submit, furthermore, that Congress in regulating broadcasting from the national standpoint may recognize differences in sectional interests, both political, economic, and cultural. Equal broadcasting service means, therefore, both equal reception of programs and opportunity to satisfy sectional interests, and this equal broadcasting service can not be given unless broadcasting stations are distributed with approximate equality among the different zones. We submit that the provisions of Section 9, as amended, making such equality a consideration in granting or refusing broadcasting licenses are neither unreasonable nor arbitrary.

By General Order 40, dated August 30, 1928, the Commission designated 40 of the 90 available frequencies as cleared channels and allocated eight of these channels to each zone, and the Commission at the same time announced that these cleared channels would be assigned to stations with a minimum power of 5,000 watts and that only one station at a time would be permitted to operate on these channels during night hours. (Annual Report of Federal Radio Commission for the year ended June 30, 1928, pp. 48–50.) The frequency of 1,190 kcs., which the American Bond and Mortgage Company had been licensed to use since June,

[1] *United States* v. *American Bond and Mortgage Co.*, 31 F. (2d) 448, 453; Report of Committee on Radio Law (52nd Ann. Rep. Am. Bar Ass'n, p. 425).

1927, was assigned by this order to the third zone, and two Texas stations in that zone, WRR and WOAI, which had previously operated on other frequencies, have since November 11, 1928, divided time on this frequency, using each a power of 5,000 watts. (*Supra*, p. 9.)

Appellants' brief (p. 80) contends that what the Commission did in denying an application for renewal of a license for appellants' station was to transfer to two other stations a privilege previously enjoyed by appellants. We submit that this was neither the purpose nor the effect of the Commission's order. Station WOAI was licensed to operate full time with 5,000 watts power both on July 1, 1927, and June 30, 1928. (Annual report of Federal Radio Commission for the year ended June 30, 1928, pp. 59, 94). When appellants' station was denied a renewal of its license on August 31, 1928, and Station WOAI was licensed to use the frequency of 1,190 kcs., the latter obtained no additional privilege; the reallocation was for it merely a change in its authorized frequency. While station WRR was previously licensed to operate on only 500 watts power (*ibid.*, pp. 60, 95) the additional privilege which it obtained following the reallocation would seem to be attributable to the Commission's action in cutting down the full operating time of Station WOAI rather than to a transfer to it of part of the privileges previously enjoyed by appellants' station.

The Commission, having determined that public interest, convenience, or necessity would not be served by renewing the license of appellants' station and having assigned the frequency used by it to the third zone, must be assumed to have found that the elimination of one or more high powered stations outside of that zone was necessary and that among such stations appellants' was the least worthy or one of the least worthy. Since appellants did not take the appeal permitted by the Act but undertook to defy the Commission's order and the statute on the ground of unconstitutionality, the correctness of the Commission's decision upon the facts is not open in this proceeding.

It is not a violation of the Fifth Amendment for Congress, in the interest of satisfactory transportation service for the entire country, to group the railroads by regions for rate-making purposes and to permit the Interstate Commerce Commission to divide joint rates between the railroads of two regions on the basis, in part, of relative needs. *New England Divisions Cases,* 261 U. S. 184, 195–196. It would seem likewise permissible for Congress to provide that the limited available broadcasting facilities should be so distributed as to give all sections of the country approximately equal service.

IV

THE RADIO ACT OF 1927 IS NOT WANTING IN DUE PROCESS BECAUSE OF INDEFINITENESS IN THE STATUTORY STANDARD OF PUBLIC INTEREST, CONVENIENCE, OR NECESSITY OR BECAUSE THE ACT DID NOT REQUIRE THE COMMISSION FURTHER TO DEFINE THE ISSUES IN ADVANCE OF A HEARING BEFORE IT

The fourth question certified in this case is the same as the fifth question certified in *White* v. *Johnson, supra.* The only fact deemed relevant to the question of law thus raised is that appellants did not exercise the right of appeal given them by Section 16 of the Act from the order of the Commission denying an application for renewal of a license for their broadcasting station. We therefore refer to the argument on this point in the Government's brief (pp. 46–51) filed with this Court in *White* v. *Johnson, supra.*

V

IF APPELLANTS WERE DEPRIVED OF THEIR PROPERTY WITHOUT DUE PROCESS OR THEIR PROPERTY WAS TAKEN FOR THE PUBLIC USE, CONTRARY TO THE FIFTH AMENDMENT, ASIDE FROM THE WAIVERS SIGNED WITH RESPECT TO OPERATION OF APPELLANTS' STATION, THE GOVERNMENT DOES NOT CONTEND THAT THESE WAIVERS IMPARTED VALIDITY TO AN OTHERWISE UNCONSTITUTIONAL TAKING OF THEIR PROPERTY

If this Court answers in the negative the first and second questions certified by the Circuit Court of Appeals or if it answers in the negative the fifth and sixth questions certified, it is unnecessary to

answer the second question relating to the validity of certain waivers signed by the American Bond and Mortgage Company, as required by the Joint Resolution of Congress of December 8, 1926, c. 1, 44 Stat. 917, and by Section 5 of the Radio Act of 1927, nor the waiver incorporated in the licenses of American Bond and Mortgage Company, as required by subparagraph (A) of Section 11 of that Act.

If this Court answers in the affirmative either the first or second question and also answers in the affirmative either the fifth or sixth question, the Government sees no reason to believe that the waivers referred to in the second question would impart validity to an otherwise unconstitutional taking of appellants' property.

We submit that these waiver provisions have this significance: They indicate that Congress believed that the operation of a broadcasting station, whether before or after the enactment of the Radio Act of 1927, created no property right in the owner thereof which could be asserted against the plenary regulatory power of Congress. They also show that no rights were secured by procuring a replacement permit under the 1927 Act which were not subject to the exercise of administrative power under the Act. (*Supra*, pp. 18–21.)

CONCLUSION

It is respectfully submitted that the first and second questions certified should be answered in the negative. It is further respectfully submitted that if either the first or second question is answered in the affirmative, the fourth, fifth, and sixth questions certified should be answered in the negative.

THOMAS D. THACHER,
Solicitor General.
CHARLES H. WESTON,
WILLIAM G. DAVIS,
Special Assistants to the Attorney General.

NOVEMBER, 1930.

U. S. GOVERNMENT PRINTING OFFICE 1930

SUPREME COURT OF THE UNITED STATES.

No. 210.—October Term, 1930.

American Bond and Mortgage Company, and Trianon, Inc. *vs.* United States of America.	On Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

[January 5, 1931.]

Mr. Justice Roberts delivered the opinion of the Court.

The same Circuit Court of Appeals which certified questions in No. 29 also certified six questions in this case. While they are differently phrased, they are in substance the same.

Here a suit in equity was brought by the United States to restrain the proprietor of a broadcasting station from disregarding an order of the Federal Radio Commission, revoking its license, and from operating in defiance of the provisions of the Radio Act. As in the other case, the appellants admittedly failed to avail themselves of the right of appeal afforded by the Act.

The reasons stated in No. 29 for not answering the questions therein certified apply here. The certificate is dismissed.

A true copy.

Test:

Clerk, Supreme Court, U. S.